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No. 87-6026-CSY  
Status: GRANTED  
CAPITAL CASE

Title: Heath A. Wilkins, Petitioner  
v.  
Missouri

Docketed:  
December 8, 1987

Court: Supreme Court of Missouri

Counsel for petitioner: McKerrow, Nancy A.

Counsel for respondent: Morris III, John M.

**CAPITAL CASE**

Entry	Date	Note	Proceedings and Orders
1	Dec 8 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 4 1988		Brief of respondent Missouri in opposition filed.
4	Jan 7 1988		DISTRIBUTED. January 22, 1988
5	Jun 24 1988		REDISTRIBUTED. June 29, 1988
7	Jun 30 1988		Petition GRANTED. limited to Question 1 presented by the petition. The case is set for oral argument in tandem with No. 87-5666, High v. Zant. *****
9	Aug 5 1988		Order extending time to file brief of petitioner on the merits until September 3, 1988.
10	Aug 15 1988		Joint appendix filed.
11	Aug 17 1988		Record filed.
		*	Certified original record received.
21	Aug 17 1988	G	Motion of West Virginia Council of Churches for leave to file a brief as amicus curiae filed.
12	Sep 2 1988		Brief amicus curiae of International Human Rights Law Group filed. VIDED.
13	Sep 2 1988		Brief amicus curiae of Defense for Children International-USA filed. VIDED.
14	Sep 2 1988		Brief amicus curiae of American Bar Association filed. VIDED.
18	Sep 2 1988		Brief amici curiae of American Society for Adolescent Psychiatry, et al. filed. VIDED.
15	Sep 3 1988		Brief amici curiae of National Legal Aid and Defender Assn., et al. filed. VIDED.
16	Sep 3 1988		Brief amici curiae of American Baptist Churches, et al. filed. VIDED.
17	Sep 3 1988		Brief amici curiae of Child Welfare League of America, et al. filed. VIDED.
19	Sep 3 1988		Brief amicus curiae of Amnesty International filed. VIDED.
24	Sep 3 1988		Brief of petitioner Heath A. Wilkins filed.
20	Sep 9 1988		Record filed.
		*	Certified original record received.
23	Sep 19 1988		Order extending time to file brief of respondent on the merits until October 13, 1988.
25	Oct 11 1988		Motion of West Virginia Council of Churches for leave to file a brief as amicus curiae GRANTED.
26	Oct 11 1988		Brief of respondent Missouri filed.
28	Oct 13 1988		Brief amici curiae of Kentucky, et al. filed.
27	Oct 17 1988		This case is set for oral argument in tandem with No.

No. 87-6026-CSY

Entry	Date	Note	Proceedings and Orders
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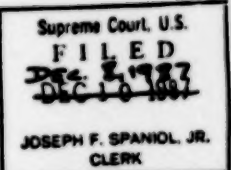
87-5765, Stanford v. Kentucky, in place of No. 87-5666,  
High v. Zant.

29	Nov 14 1988		Reply brief of petitioner Heath A. Wilkins filed.
30	Feb 3 1989		SET FOR ARGUMENT MONDAY, MARCH 27, 1989. (3RD CASE)
31	Feb 15 1989		CIRCULATED.
32	Mar 10 1989		Record filed.
		*	one vol, certified record
33	Mar 27 1989		ARGUED.



**EDITOR'S NOTE**

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IN THE SUPREME COURT OF THE UNITED STATES  
NO. **87-6026**

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MISSOURI

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987  
NO. \_\_\_\_\_

HEATH A. WILKINS,  
Petitioner,  
v.  
STATE OF MISSOURI,  
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MISSOURI

Heath A. Wilkins, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, in the case styled "State of Missouri v. Heath A. Wilkins, No. 68393".

LIST OF PARTIES

The petitioner, Heath A. Wilkins, appears through Lew A. Kollias, and Nancy A. McKerrow, Office of State Public Defender, 209B East Green Meadows Road, Columbia, Missouri 65203-3698.

Respondent, State of Missouri, appears by the Honorable William Webster, Attorney General of Missouri, P. O. Box 899, Jefferson City, Missouri 65102. Janet Thompson and Nancy A. McKerrow, Assistant Public Defenders, 209B East Green Meadows Road, Columbia, Missouri 65102, appeared in the proceedings before the Missouri Supreme Court, No. 68393.

OPINION BELOW

The opinion of the Supreme Court of the State of Missouri, in the case styled "State of Missouri v. Heath A. Wilkins, No. 68393," the case for which certiorari is being sought, was filed on September 15, 1987, appears at 736 S.W.2d 409 (Mo. band 1987).



and may be found in the Appendix at pages 1-13. Counsel for Petitioner timely filed a Motion for Rehearing, which was denied on October 13, 1987. Thereafter, on October 13, 1987, the Missouri Supreme Court set Petitioner's death penalty execution date at December 17, 1987 (App. 22).

#### JURISDICTION

On September 15, 1987, an opinion rendered by the Supreme Court of Missouri affirmed the Petitioner's judgment and conviction for Capital Murder and his sentence of death (App. 1-13). Counsel for Petitioner timely filed a Motion for Rehearing, which was denied on October 13, 1987 (App. 21). On October 13, 1987, the Missouri Supreme Court set petitioner's execution date for December 17, 1987 (App. 22). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) (1987).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides, in pertinent part:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the Constitution of the United States, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

This case also involves the following provisions of the statutes of the State of Missouri, which are set forth in the Appendix: Mo. Rev. Stat. Sections 552.020, 552.030, and 565.020 (1986).

#### QUESTIONS PRESENTED FOR REVIEW

1. Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

2. If a criminal defendant in a capital murder case is found competent to stand trial, does the due process clause of the Fifth Amendment require a separate determination or heightened test of competency before that criminal defendant may waive his constitutional rights to counsel and to a jury trial in order to seek the death penalty?

3. Whether the infliction of the death penalty on Petitioner Wilkins constitutes excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States in light of the overwhelming mitigating circumstances in his case?

#### STATEMENT OF THE CASE

On May 9, 1986, in the Circuit Court of Clay County, Missouri, appellant entered a plea of guilty to the charge of first degree murder, Mo. Rev. Stat. Section 565.020.1 (Cum. Supp. 1984). On June 27, 1986, appellant was sentenced to death.

Appellant was sixteen-years old on July 27, 1985 when, in the late evening hours, he and Patrick ("Bo") Stevens entered Linda's Liquors in Avondale, Clay County, Missouri, and robbed it. In the course of the robbery appellant stabbed the clerk, Nancy Allen, who died from her wounds. Appellant was arrested fourteen days later and, after being certified to stand trial as an adult, was charged by information with first degree murder.

Appellant initially pleaded not guilty by reason of mental disease or defect and he was ordered to undergo a psychiatric examination pursuant to Mo. Rev. Stat. Sections 552.020 and 552.030 (1986). Appellant was evaluated a second time, at the request of the defense



A competency hearing was held on April 16, 1986 during which two witnesses, Drs. Mandracchia and Logan, testified. Steven Mandracchia is a clinical psychologist for the State of Missouri. He testified that based upon his evaluation of petitioner he did not believe that petitioner was suffering from any mental disease or defect as defined by Chapter 552 of the Revised Statutes of the State of Missouri. Mandracchia further opined that appellant was competent to proceed, and finally, that appellant was competent to make the decision to plead guilty and to seek the death penalty. When he interviewed petitioner in November, 1985, Mandracchia was unaware of petitioner's desire to plead guilty.

Dr. William S. Logan is a psychiatrist and director of law and psychiatry at the Menninger Foundation. Logan testified that he had not reached a definite conclusion as to petitioner's competence to proceed. According to Logan:

he (petitioner) has a fairly good cognitive and rational understanding of what court procedures are about, but there are some emotional things involved that could interfere with his decision making process at certain critical points.

Logan testified about petitioner's history of mental illness which began, according to Logan, "at the age of 5 or 6, if not before", and the kind of treatment necessary if any improvement in petitioner's mental health was to be made.

The trial court found petitioner competent "to proceed" and immediately thereafter petitioner informed the court that he wished to discharge his attorney and proceed pro se for the express purpose of seeking the death penalty.

On April 23, 1986, the trial court accepted petitioner's waiver of counsel, but ordered counsel to remain available for consultation. Petitioner then informed the court that he wanted to plead guilty. The trial court explained petitioner's rights to him, described death by lethal gas, and urged petitioner to change his mind.

On May 9, 1986 petitioner's guilty plea was accepted. Before accepting the plea the trial court stated that it had found petitioner competent on April 16, 1986 and then asked petitioner if he felt he was competent. Petitioner responded that he was.

On June 27, 1986 a sentencing hearing was held. After presentation of evidence, during which petitioner successfully objected to testimony which may have indicated the existence of mitigating factors, petitioner requested and received the death penalty.

Proceeding pro se, petitioner took none of the prescribed steps to appeal his guilty plea and death penalty. The Missouri Supreme Court requested the State Public Defender to enter the case as amicus curiae and to brief and argue the case.

After argument, the Court ordered petitioner examined by the Department of Mental Health of Missouri to determine his competency to waive counsel on appeal. Based upon the report it received from Dr. S.D. Parwatkar, which stated in pertinent part that petitioner "suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his constitutional rights and represent himself in front of the court," the Missouri Supreme Court set aside the submission and appointed counsel to represent petitioner.

On appeal, petitioner's appointed counsel raised four issues (Appendix 42-54).

In an opinion filed on September 15, 1987, the Missouri Supreme Court, in a 4-3 decision, rejected each of petitioner's claims of error and affirmed the death sentence.

#### REASONS TO GRANT THE WRIT

1. THE IMPOSITION OF A DEATH SENTENCE FOR AN OFFENSE COMMITTED BY A CHILD BELOW THE AGE OF EIGHTEEN CONSTITUTES CRUEL

#### AND UNUSUAL PUNISHMENT.

This Court has never directly decided whether it is unconstitutional to apply the death penalty to a juvenile offender.<sup>1</sup> In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court granted certiorari to resolve that issue, but decided the case on other grounds and the juvenile issue was expressly not decided. Nonetheless, Justice Powell, writing for the Eddings court, recognized that:

Youth is more than a chronological fact. It is a time and condition in life when a person may be most susceptible to influence and to psychological damage. Our history is replete with law and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

455 U.S. at 115-116. Since minors lack the ability, through experience, perspective, and judgment to recognize and avoid choices and decisions detrimental to them, it has long been recognized that "juvenile offenders constitutionally may be treated differently from adults." Belotti v. Baird, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), reh'g denied, 444 U.S. 887 (1979).

Reflecting the distinct attitude held by society toward the juvenile offender, every state now has a comprehensive juvenile court system, see, Kent v. United States, 383 U.S. 541, 544 n. 19, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), and Missouri is no exception. See: Mo. Rev. Stat. Chapters 210 and 211 (1986). Further, by enacting, in 1950, the Federal Youth Corrections Act, 18 U.S.C. Sections 5005-5026 (1982), the federal government recognized the need "to provide a better method of treating young offenders . . . in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns." Doraszynski v. United States, 418 U.S. 424, 432-33, 94 S.Ct. 3042, 41 L.Ed.2d 895 (1974). Reflecting this general attitude, the express purpose of

<sup>1</sup> That issue is presently before the Court in Thompson v. Oklahoma, No. 86-6169, cert. granted, 107 S.Ct. 1284-85 (1987).

the Missouri Juvenile Code is

to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them.

Mo. Rev. Stat. Section 211.011 (1986). Thus, the legislature has recognized that, in cases involving juvenile offenders, the emphasis must be placed on the welfare of the juvenile and not on traditional notions of punishment and retribution that are the hallmark of adult offender cases.

Contemporary legislation also reflects the societal perception that a juvenile offender presents a distinct case from an adult offender. Ten states which have capital punishment statutes expressly prohibit the application of those statutes to juveniles.<sup>2</sup> Six of these states<sup>3</sup> set the minimum age for the imposition of the death penalty at 18; three<sup>4</sup> use 17 as the minimum, and one<sup>5</sup> sets 16 as the cutoff point.

Eleven other states, including Missouri, recognize the distinction between juvenile and adult offenders by giving exclusive original jurisdiction to the juvenile court, and they establish a minimum age at which juvenile court jurisdiction may be waived and the cause transferred to adult criminal court. In

<sup>2</sup> Cal. Penal Code Section 190.5 (Supp. 1985); Conn. Gen. Stat. Ann. Section 53a-46a(f)(1) (Supp. 1982); Ga. Code Ann. Section 17-9-3 (1982); Ill. Ann. Stat. Ch. 38 Section 9-1(b) (Supp. 1985); Neb. Rev. Stat. Section 28-105.01 (1982); Nev. Rev. Stat. Section 176.025 (1979); N.H. Rev. Stat. Section 630:5(1)(b)(5) (Supp. 1981); Ohio Rev. Code Ann. Section 2929.92(E) (1984); Tenn. Code Ann. Section 37-1-134(1) (1984); Tex. Penal Code Ann. Section 8.07(d) (Supp. 1985).

<sup>3</sup> California, Connecticut, Illinois, Nebraska, Ohio and Tennessee.

<sup>4</sup> Georgia, New Hampshire and Texas.

<sup>5</sup> Nevada.

Missouri, as in four other states,<sup>6</sup> that age has been set at 14. Mo. Rev. Stat. Section 211.071 (1986). Further, in Missouri, as in many other states, the age of the offender is specifically designated as a mitigating circumstance in the capital punishment statute. Mo. Rev. Stat. Section 565.032 (1986).

Societal concern for the imposition of the death penalty on juvenile offenders and the concomitant recognition that the process involves extraordinary considerations is reflected in the decreasing numbers, over the last fifty years, of instances in which capital sentences are imposed and executed against juvenile offenders; see Teeters-Zibulka, "Executions Under State Authority: 1864-1967", R.W. Bowers, Legal Homicide (1984).<sup>7</sup> Appendix 59-65, V. Streib, Death Penalty for Juveniles: Past, Present and Future (1985), and Appendix 66-71, V. Streib, Persons on Death Row as of December 1985 for Crimes Committed While Under Age Eighteen (1986). As the American Law Institute has stated, "civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders." ALI, Model Penal Code, Section 210.6 Comment, 133 (Official Draft & Revised Comments, 1980).

<sup>6</sup> Ala. Code Section 12-15-34(a) (1977); Ky. Rev. Stat. Ann. Section 208F.070(2) (1980); N.J. Stat. Section 2A:4A-26 (Supp. 1984); and Utah Code Ann. Section 78-3a-25(1) (Supp. 1983).

<sup>7</sup> The data presented therein indicates the following:

Executions of Young People in the U.S. By Date, Race & Age at Execution: 1864-1967									
	16B	16W	17B	17W	18B	18W	19B	19W	Totals
1864-1939	4	1	16	6	31	8	26	21	114
1940-49	6	1	11	2	17	0	15	6	58
1950-54	0	0	2	0	2	0	8	2	14
1955-59	0	0	2	0	3	2	1	1	9
1960-67	0	0	1	0	0	0	1	0	2
	10	3	32	8	53	10	51	30	197

The state of Missouri has indicated, time and again, its paternalistic attitude toward juveniles. For example, one who is unmarried and sixteen years old, as was petitioner when he committed the offense, cannot vote, Mo. Rev. Stat. Section 115.133 (1986), cannot sit on a jury, Mo. Rev. Stat. Section 494.010 (1986), cannot buy or possess alcoholic beverages, Mo. Rev. Stat. Section 311.325 (1986), cannot enter into a contract, Mo. Rev. Stat. Section 431.055 (1986), and cannot sue or be sued, Mo. Rev. Stat. Section 507.110 (1986). It is thus not only incongruous but completely inconsistent that one who is treated as a minor and is protected in all other realms should be treated as an adult for this purpose alone and be executed as an adult.

Petitioner finally asserts that the imposition of the death penalty in this case, where petitioner was only sixteen-years old when the murder occurred, violates the fundamental precepts of international law.

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), this Court stressed, as it had in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), in which the Court found the death penalty for the rape of an adult woman to be grossly disproportionate and excessive, that, to the greatest extent possible, all objective criteria is helpful and should be utilized in making the proportionality determination. 458 U.S. at 788. The Enmund court went on to note, "Accordingly, the court looked to the historical development of the punishment at issue, legislative judgment, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter." 458 U.S. at 788-789 (emphasis supplied). Further, "[T]he climate of international opinion concerning the acceptability of a particular punishment is an additional consideration which is 'not irrelevant.'" 458 U.S. at 796 n. 22, citing Coker, 433 U.S. at 596 n. 10.



Article I of the American Declaration for the Rights and Duties of Man, adopted at the Ninth International Conference of American States in 1948,<sup>8</sup> guarantees all people the right to life; Article VII provides that protection, care, and aid be specially afforded to children, and Article XXVI prohibits the imposition of cruel, infamous, or unusual punishment upon an offender. These guarantees can be read to prohibit the imposition of the death penalty upon a juvenile.

Over 80 nations have either completely abolished the death penalty or have forbidden its application to certain offenses and to certain offenders, including juveniles. Hartman, "Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty", 52 U. of Cin. L. Rev. 655, 666 n. 44 (1983). Recent data indicates that 41 nations which have retained the death penalty have statutory provisions exempting youth from its imposition,--five of those countries being member states of the Organization of American States. Id. The available data indicates that "[T]he great majority of Member States [of the United Nations] report never condemning to death persons under 18 years of age." U.S. Economic & Social Council, Report of the Secretary General on Capital Punishment at 17. U.N. DOC. E/5242 (1973).

Notably, in the international community, at least three instruments regarding human rights prohibit the imposition of the death penalty on juvenile offenders. Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, DOC 65 Rev. 1 Corr.1 (1970), provides that "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age." Article 6(5) of the International Covenant on Civil and Political

<sup>8</sup> The Declaration is legally binding on the United States as a member of the Organization of American States. Case 2141 (1981), International Commission on Human Rights.

Rights, Annex to G.A. Res. 2200, 21 U.S. GAIR Res. Supp. (No. 16), at 53, U.S. DOC A/6316 (1966), states that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age." Finally, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 Section 75 U.N.I.S. 287, provides, in part, that "In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense."

Furthermore, in the United States itself, the American Law Institute, in the Model Penal Code, has recommended a bar to the execution of offenders who committed the subject crime while under 18 years of age. ALI Model Penal Code Section 210.6(1)(d) (Proposed Official Draft, 1962); Section 210.6, Comment, 133 (Official Draft & Revised Comments 1980). Finally, in 1983, the American Bar Association passed a resolution opposing the "imposition of capital punishment upon any person for any offense committed while under the age of 18". ABA Report No. 117A, approved August 1983.

Petitioner asserts that, under the "evolving standards of decency that mark the progress of a maturing society" Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), the execution of one who was still a juvenile, here, sixteen years of age, when the offense was committed, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. This Court should grant certiorari to the Missouri Supreme Court in order to review this issue, or hold this petition in abeyance pending resolution of this issue.

2 THE MISSOURI SUPREME COURT HAS DECIDED THAT THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE A SEPARATE DETERMINATION OR HEIGHTENED TEST OF

COMPETENCY BEFORE A CRIMINAL DEFENDANT MAY WAIVE HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND TO A JURY TRIAL SO LONG AS THAT DEFENDANT HAS BEEN FOUND COMPETENT TO STAND TRIAL THAT DECISION CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT, FEDERAL COURTS OF APPEAL, AND THIS COURT'S DECISION IN WESTBROOK V. ARIZONA

Petitioner submits that the Missouri Supreme Court's opinion, wherein it denies petitioner's assertion that "a heightened test of competency" was required in his case, conflicts with this Court's decision in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) (per curiam), and decisions of other courts, both state and federal, which have decided this issue.

In denying this point, the Missouri Supreme Court held that:

Counsel urge that there should be a heightened test of competency in this case. Although an incompetent, as a juvenile, may be impaired by his limited cognitive and social capacities, [citation omitted] Judge McFarland could not have been more unbiased, reasonable and fair in his consideration of competency. Any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of Miranda. Id. at 961 (juveniles may validly waive both self-incrimination and right to counsel privileges). Moreover, and analogous to the threshold question of competency to stand trial, Missouri law presumes competency, as all persons are presumed to be free of mental disease or defect which would exclude their responsibility for their conduct. Section 551.030.7, RSMo Supp. 1984. The point is denied.

Appendix at 6.

In Westbrook, this Court reversed a first degree murder conviction where the death penalty had been imposed because, although there had been a hearing on the issue of the defendant's competency to stand trial, there had been no hearing or inquiry into the issue of his "competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." Id. 384 U.S. at 151. Lower courts have reached conflicting decisions on what the decision in Westbrook requires

At least four courts have concluded that Westbrook indicates that the standard for competency to waive the right to counsel is higher than the standard for competency to stand trial. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. (1987)); Pickens v. State, 292 N.W.2d 601 (Wis. 1980); United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); State v. Kolocotronis, 73 Wash. 2d 92, 101, 436 P.2d 774 (1968). However, two courts have rejected such an interpretation finding either that formulating a separate, higher competency standard would prove unworkable, People v. Reason, 37 N.Y.2d 351, 354, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975), or, that a defendant's competence to act as his own lawyer is irrelevant so long as he has the mental capacity to realize the probable risks and consequences of self-representation. Curry v. Superior Court, 75 Cal. App. 3d 231, 228-229, 141 Cal. Rptr. 884, 887 (1977). One other court expressly declined to decide the issue but recognized that a separate hearing, based on a higher standard, may be required. Goode v. Wainwright, 704 F.2d 593, 597 (11th Cir. 1983), rev'd on other grounds, 464 U.S. 78 (1984).

Likewise, lower courts have split on the issue of whether Westbrook mandates a higher standard of competency in cases where the issue is the defendant's right to waive trial by jury and to plead guilty. In Stieling v. Eymann, 478 F.2d 211 (9th Cir. 1973), the Ninth Circuit, relying on Westbrook, held that a higher standard of competency is required to waive constitutional rights than is required to stand trial. Id. at 213. The Stieling court held that the standard used should "require a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced." Id. at 215. One other circuit has expressly adopted the reasoning of the Stieling court. United States v. Mathers, 539 F.2d 721 (D.C. Cir. 1976) ("the level of awareness and comprehension necessary



for a valid waiver of constitutional rights differs from the level necessary to stand trial." Id. at 726 n. 30), as have two state courts. See, State v. Jones, 664 F.2d 1216, 1219 (Wash. 1983) (en banc); State v. Cameron, 704 F.2d 1355, 1357 (Ariz. App. 1985).

Other circuits have rejected Sisling, at least in cases where the defendant is represented by counsel. See e.g., United States v. Harlan, 480 F.2d 515 (6th Cir.), cert. denied, 414 U.S. 1006 (1973); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974); United States ex rel. McGough v. Hewitt, 528 F.2d 339, 342 n. 2 (3d Cir. 1975); Allard v. Helgeson, 572 F.2d 1, 5 (1st Cir. 1978), cert. denied, 439 U.S. 858 (1978); United States ex rel. Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981).

Petitioner would urge this Court to grant the petition in order to settle this question. Petitioner submits that the reasoning of the Ninth Circuit, that a higher standard of competency is required to waive constitutional rights than is necessary to stand trial, should be adopted.

Even if this Court rejects the Ninth Circuit's reasoning for most criminal defendants, petitioner contends that the separate determination and heightened standard of competency are required in those cases, such as this, where the State seeks to impose the ultimate punishment. In capital cases, the competency standard enunciated by this Court in Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) is appropriate and should be applied. Rees involved a defendant convicted of murder and sentenced to death. Although the defendant had cooperated with counsel during trial and appeal, after those efforts were unsuccessful he instructed his attorney to abandon the attempt for certiorari review and to forego further legal proceedings. Petitioner, like the defendant in Rees, is asserting his "right" to demand his own execution by foregoing legal proceedings. In essence, petitioner's decision to forego further proceedings was

brought to fruition on April 29, 1986 when the trial court allowed him to waive counsel and proceed pro se. In Rees, it was established that, as a matter of due process, a prisoner cannot be permitted to refuse the assistance of counsel and terminate legal proceedings without an adequate hearing to determine his ability to rationally make such a choice. The standard enunciated in Rees is as follows:

Whether the defendant has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or whether he is suffering from mental disease, disorder or defect which may substantially affect his capacity in the premises.

Id., 384 U.S. at 314.

This Court has repeatedly recognized that the death penalty is unique in its finality, and therefore, enhanced due process protections are required. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, 117-118 (1982) (O'Connor, J. concurring); Beck v. Alabama, 447 U.S. 264, 272, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954 57 L.Ed.2d 973 (1978); see also, State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985); see generally: Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S.Cal.L.Rev. 1143 (1980).

An element of the procedural protections American jurisprudence provides those charged with crimes is the allocation of the risk of erroneous decisions. In cases involving the death penalty, the State imposes upon itself the "beyond a reasonable doubt standard" even at the punishment stage of the proceedings, Mo. Rev. Stat. Section 565.030 (1986), because when the State seeks to impose the ultimate punishment, it must be as certain as is humanly possible that no mistakes are made. Fullington v. Missouri, 451 U.S. 430, 441, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Addington v. Texas, 441 U.S. 418, 423-24, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Such heightened due process is lacking in petitioner's case.

The trial court made no finding on the issue of petitioner's competence to waive his constitutional right to counsel and to a trial by jury. Neither the finding of competency to stand trial nor the guilty plea proceedings held in petitioner's case adequately resolved the question of his competency to waive his constitutional right to counsel or his right to a jury trial. His competency to make such waivers was not the issue at the April 16, 1987 competency hearing,<sup>9</sup> and the trial court never made a finding on that issue. Further, the numerous colloquies preceding the acceptance of petitioner's waiver of counsel and guilty plea cannot suffice to resolve the issue since they consisted of no more than the usual inquiries concerning voluntariness, lack of coercion and understanding of the consequences, and did not extend into the area of petitioner's mental competency at all. Under Rees and Westbrook, it is simply not enough that petitioner was found competent to stand trial. The standard for finding a defendant competent to stand trial in Missouri is less rigorous than is required for a finding that a defendant possesses the mental/emotional ability to make a knowing and voluntary waiver of constitutional rights. Such a heightened standard is critically important here, where the State seeks to impose the ultimate punishment.

Petitioner asserts that the procedure used, and the evidence adduced, by the trial court to determine his competency in this case was inadequate to ensure against error. The finding of competency in this case was made without specific reference to the gravity of the decisions petitioner was making. When it became known to the trial court that more was at stake here than

<sup>9</sup> At the competency hearing, Dr. Mandracchia offered his opinion that petitioner was competent to make the decision to plead guilty and seek the death penalty. However, when Mandracchia evaluated petitioner in November, 1985, he was unaware that petitioner would waive his right to counsel and plead guilty. Dr. Logan, who was aware of petitioner's desire to waive his right to counsel and plead guilty, did not reach a definite conclusion concerning petitioner's competency.

petitioner's "capacity to understand the proceedings against him or to assist in his own defense",<sup>10</sup> a separate inquiry was necessary, and without it, the risk of error is simply too great to be countenanced. The risk that an erroneous decision may have been made in this case becomes clear when the information available to the trial court is set out:

- there were two mental evaluations performed, one based on a one and one half hour interview, the other on a five hour interview;

- one doctor offered his opinion that petitioner was competent not only to stand trial, but also to seek the death penalty, even though he was unaware that that was petitioner's intent at the time of the interview;

- the other doctor refused to state a definite opinion as to petitioner's competency;

- petitioner has a long history of mental illness including suicidal and homicidal tendencies, drug abuse, and a family history of mental illness; and finally,

- petitioner has consistently made determined efforts to guarantee himself the death penalty.

The trial court's action of permitting petitioner to waive his constitutional rights to counsel and his right to a jury trial without a separate determination of petitioner's competency to do so was a denial of petitioner's right to due process. The Missouri Supreme Court's opinion which ratifies that action is in conflict with this Court's decisions in Westbrook v. Arizona, supra and Rees v. Peyton, supra, and the decisions of other federal and state courts which have considered this issue.

The Missouri Supreme Court's disposition of this issue is particularly distressing in light of the findings of Dr. S.D. Parwatikar. Dr. Parwatikar evaluated petitioner pursuant to the Missouri Supreme Court's October 3, 1986 Order (Appendix at 24). According to Parwatikar's report of December 29, 1986 (Appendix 28-40), petitioner was evaluated to determine his competence to waive his right to counsel. Parwatikar concluded that petitioner

<sup>10</sup> Mo. Rev. Stat. Section 552.020 (1986)

is "not competent to waive his constitutional rights and represent himself in front of the court". Petitioner submits that it is anomalous for the Missouri Supreme Court to find that petitioner is currently incompetent to represent himself on appeal while at the same time finding that on April 23, 1986 petitioner was competent to waive his right to counsel and that on May 9, 1986 petitioner was competent to waive his right to a jury trial. This Court should grant certiorari to the Missouri Supreme Court in order to settle this issue.

3. THE INFLICTION OF THE DEATH PENALTY ON PETITIONER WILKINS WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN LIGHT OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN HIS CASE.

The Eighth Amendment's prohibition against cruel and unusual punishment has long been recognized to include as "a precept of justice that punishment for crime should be graduated and proportioned to the offense." Weems v. United States, 217 U.S. 349, 367 (1910). The proportionality of a particular punishment may be considered not only in the abstract, for example, where the Court considered the propriety of the death penalty for the rape of an adult female, Coker v. Georgia, 438 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), but also in the particular where the Court is asked to determine the propriety of death as a penalty to be applied to a specific defendant for a specific crime. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976), reh'g denied, 429 U.S. 875 (1976). This Court has on several occasions entertained claims that a particular death sentence was excessive or disproportionate, see, e.g., Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 2991 n. 40, 49 L.Ed.2d 944 (1976); Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 2981 n. 57 L.Ed.2d 1010 (1978); Lockett v. Ohio, 438 U.S. 586,

98 S.Ct. 2954, 2967 n. 10, 57 L.Ed.2d 973 (1978), but has never been required to decide those claims.

Petitioner presented uncontroverted evidence of at least three factors which, considered together, overwhelmingly mitigate his crime.

First, there is evidence in the record that petitioner has a long-term history of mental illness, which may be genetically based, and which impaired his ability to appreciate the wrongfulness of his conduct and his capacity to conform his conduct to the requirements of law.

Second, the murder was committed while petitioner, who has a history of drug and alcohol abuse, was under the influence of illicit drugs, specifically LSD, a known hallucinogen, which he had ingested at least three times on July 27, 1985, the last being within four hours of the murder. Petitioner had also ingested quantities of alcohol in the period immediately preceding the murder. Petitioner's ability to appreciate the wrongfulness of his conduct and his capacity to conform his conduct to the requirements of law was thus substantially impaired.

Finally, petitioner was only sixteen-years old when he committed the offense.

Petitioner has a long-term history of mental illness, which, according to Dr. Logan manifested itself at least by age five. Sherry Wilkins, petitioner's mother, was the daughter of an alcoholic father and she apparently physically abused petitioner when he was a child. Petitioner's only sibling, Jerrod, suffered severe emotional and mental problems and was ultimately diagnosed as schizophrenic. During petitioner's own psychiatric and psychological evaluations and treatment it was suggested, on at least one occasion, that petitioner's emotional and mental problems have some genetic basis.



Petitioner has been involved in the juvenile justice system since the age of eight. In 1979, he began a series of placements and psychiatric evaluations that continued until 1985. Among the institutions that dealt with petitioner are Tri-County Mental Health Center, Western Missouri Mental Health Center, Butterfield Youth Services, and the Crittenden Center. Petitioner's history as set forth in his records from these institutions shows that he has demonstrated extreme psychoses, manifested by a long-term pattern of suicide attempts. These suicide attempts, petitioner asserts, have culminated in this last, state-aided, attempt to commit suicide.<sup>11</sup> Dr. Logan stated that, on several occasions, anti-psychotic medication was prescribed for petitioner which he would not take. Petitioner himself, in the course of the evaluations by the doctor, described his mental state and resulting conduct on the night in question as "automatic" and like a "machine", thus raising the inference that his conscious, reasoning mind had ceased to function at the time of the occurrence. Dr. Logan further indicated that petitioner was a very disturbed boy on the night in question. Petitioner asserts that, because of his mental illness, he lacked the capacity to conform his conduct to the requirements of law.

Also in evidence and uncontested is petitioner's substantial history of drug and alcohol abuse, as well as his use, on the night in question, of both alcohol and LSD, a known hallucinogenic drug. It is uncontested that petitioner first began to use illicit drugs at approximately age five and that his drug and alcohol use increased practically unabated, extending from the use of marijuana to stronger hallucinogenic drugs such

<sup>11</sup> Psychologists have recognized, as a typical response of one who wishes to commit suicide, the "suicide-homicide" phenomenon. Under this phenomenon, the desire to commit suicide is effectuated by means of the commission of a homicide that carries with it the likelihood that the death penalty will be imposed. See G. R. Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. of Crim. Law & Criminology 860 (1983).

as LSD, which was his preferred drug. Petitioner has consistently maintained that, on July 27, 1985, he had had at least three "hits" of acid. Further, during that evening, he had been drinking fairly heavily and had again used LSD; taking the last "hit" of LSD within four hours of the murder. Petitioner asserts that, given his history of drug abuse and, more particularly, his abuse of both alcohol and LSD on the night of July 27, 1985, his ability to conform his conduct to the requirements of law was substantially impaired.

Finally, petitioner notes that, on July 27, 1985, he was a boy of only sixteen years of age. As an adolescent, he was

more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault, offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

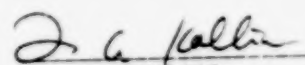
Eddings v. Oklahoma, 455 U.S. 104, 116 n. 11, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). Furthermore, the ability of a boy of 16 years to think in moral terms and to engage in moral judgments has not yet fully developed, as it generally has in people of more advanced years. Rest. Davidson & Robbins, Age Trends in Judging Moral Issues, 49 Child Development 263 (1978); Kohlberg, Development of Moral Character and Moral Ideology, in Hoffman & Hoffman, Review of Child Development Research, 404-405 (1964). Petitioner thus asserts that the death penalty was inappropriately imposed and is disproportionate and excessive given petitioner's age and his concomitant lack of capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of

It should also be noted that the existence of these mitigating factors may not have been fully considered by the trial court in assessing death as the appropriate punishment in this case. At the sentencing hearing petitioner had no interest in presenting mitigating evidence and, in fact, objected to testimony which may have provided mitigating evidence. The trial court sustained each of petitioner's objections. This Court should grant certiorari to establish that the death penalty is disproportionate and excessive punishment considering petitioner's age, his cognitive-emotional disorder, and his extensive drug use.

# CONCLUSION

For the reasons set forth in the Petition, petitioner respectfully submits that the Court should issue a writ of certiorari to the Missouri Supreme Court in order to review the issues raised herein.

Respectfully submitted,

  
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<sup>12</sup> Three justices of the Missouri Supreme Court agreed that punishing petitioner with death would be disproportionate and excessive. See, Appendix at 1-13, State v. Wilkins, 738 S.W.2d 409, 418 (Donnelly, J. dissenting).

## IN THE SUPREME COURT OF THE UNITED STATES

NO \_\_\_\_\_

HEATH A. WILKINS,

Petitioner,

v

STATE OF MISSOURI,

Respondent.

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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STATE of Missouri, Respondent,

v.

Heath A. WILKINS, Appellant.

No. 68393.

Supreme Court of Missouri,  
En Banc.

Sept. 15, 1987.

Rehearing Denied Oct. 13, 1987.

Juvenile defendant was convicted in the Circuit Court of Clay County, Glennon E. McFarland, J., of first-degree murder, and sentenced to death, and he appealed. The Supreme Court, Billings, C.J., held that: (1) evidence supported determination that defendant was competent to stand trial; (2) Circuit Court considered mitigating factors in imposing death sentence; (3) death sentence was not result of prejudice, passion, or any other arbitrary factors; (4) death sentence was supported by evidence of statutory aggravating factors; and (5) death sentence was not disproportionate or excessive when compared to similar cases.

Affirmed.

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Blackmar and Donnelly, JJ., filed dissenting opinions, in which Welliver, J., concurred.

Welliver, J., filed dissenting opinion.

## 1. Criminal Law ¶1213.8(8)

Death penalty was not cruel and unusual punishment under the United States or the Missouri Constitutions. Const. Art. 1, § 21; U.S.C.A. Const.Amend. 8.

## 2. Criminal Law ¶625

Overwhelming and uncontroverted evidence on record established that juvenile defendant had capacity to understand proceedings against him and to assist in his own defense and was, therefore, competent to stand trial; psychological record was extensive and consisted not only of expert testimony but also galaxy of tests, and records on which they relied, from numerous institutions with which defendant had dealt. V.A.M.S. § 552.020, subd. 3(1) (1984).

## 3. Mental Health ¶432

Juvenile defendant, exposed to possible death penalty, was not entitled to heightened test of competency to stand trial. V.A.M.S. § 552.030, subd. 7; § 552.020, subd. 3(1) (1984).

## 4. Homicide ¶354

Trial court properly considered mitigating factors in sentencing juvenile defendant to death for first-degree murder conviction; in addition to defendant's age and educational background, trial court considered whether murder was committed while defendant was under influence of extreme mental or emotional disturbance and whether capacity of defendant to appreciate criminality of his conduct or to conform his conduct to requirements of law was substantially impaired. V.A.M.S. §§ 565.030, subd. 4(2, 3), 565.032, subd. 3(2, 3).

## 5. Homicide ¶354

Imposition of death penalty upon juvenile defendant for first-degree murder conviction was not influenced by passion or prejudice. V.A.M.S. § 565.035.

## 6. Homicide ¶354

Imposition of death penalty upon juvenile defendant was supported by evidence of statutory aggravating factors enumerated by trier of fact; evidence supported trial court's finding that defendant committed murder in wantonly vile, horrible, and inhuman manner, and that defendant committed murder during robbery. V.A.M.S. §§ 565.032, subd. 2(7, 11), 565.035.

## 7. Homicide ¶354

Imposition of death sentence upon juvenile defendant for first-degree murder conviction was not disproportionate to penalty imposed in similar cases considering both circumstances of crime and defendant; murder was substantially more heinous than past killings which had been found to justify sentence of death, evidence against defendant was strong, and defendant had cruel attitude toward human life. V.A.M.S. §§ 565.035, 565.035, subd. 3(3).

Janet M. Thompson, Nancy A. McKerrrow, Columbia, for appellant.

William L. Webster, Atty. Gen., John M. Morris, Asst. Atty. Gen., Jefferson City, for respondent.

BILLINGS, Chief Justice.

Defendant Heath A. Wilkins pleaded guilty to first degree murder and was sentenced to death for the brutal and multiple stabbing killing of a 26-year-old mother of two small children during the course of a robbery of the victim's convenience store. Affirmed.

Defendant, proceeding pro se after dismissing and waiving appointed counsel, entered pleas of guilty to the murder charge, armed criminal action (sentenced to life imprisonment), and unlawful use of a weapon (sentenced to five years imprisonment), the last charge arising at the time of defendant's arrest approximately two weeks after the murder. Even though defendant dismissed and waived his right to an attorney, the trial judge directed the attorney to stand by throughout all of the proceedings and be available to counsel and advise the defendant upon the latter's request.

The transcript of some 300 pages clearly reveals that the experienced and capable trial judge, the Honorable Glennon E. McFarland, fully explained, time and time again, defendant's various legal rights. Judge McFarland made repeated efforts to dissuade defendant from dismissing counsel and proceeding without an attorney. And, the conscientious trial judge offered to permit defendant to reconsider and withdraw his guilty pleas. Throughout the several court hearings, the defendant told the trial judge that he had fully and knowingly considered the alternative punishment of life imprisonment without eligibility for parole and that of the two possible sentences he preferred the death sentence. Section 565.020, RSMo 1986.

Because of defendant's stated position and acting as his own attorney, defendant did not take any of the prescribed steps to appeal his guilty plea and death penalty. Nevertheless, this Court requested the State Public Defender to enter the case as *amicus curiae* and to brief and argue "any issue subject to review."

The case was argued before the Court after defendant, appearing in person, advised the Court that he did not want the assistance of an attorney in the proceedings in this Court. At the conclusion of the arguments, the defendant was permitted to make a statement to the Court in which he took issue with some remarks of the public defenders arguing the case. The Court ordered defendant examined by the Department of Mental Health of Missouri to determine defendant's competence to waive counsel on appeal and ordered the case held under submission pending the report.

The report and evaluation of the defendant by the Department of Mental Health was filed with the Court, and the Court set aside the submission and appointed counsel to represent defendant. New briefs were filed and argument heard anew.

The complete record, consisting of the legal file and transcript, are before the Court. In order that this Court can properly review the death penalty imposed in this case and also consider the points advanced by the appointed counsel, it is necessary to

set forth in some detail the evidence which led to the imposition of the ultimate penalty.

Approximately two weeks before July 27, 1985, the date of Nancy Allen's murder, defendant's friend, Patrick Stevens, was telling the defendant that he needed some money. "I [Wilkins] said, 'I know where we can get some money.' ... I told him exactly how we were going to do it and where we were going to do it." Defendant then described to Stevens a plan to rob Linda's Liquors, which was later communicated to two other confederates, Ray Thompson and Marjorie Filipiak. Linda's Liquors and Deli was owned and operated by Nancy and David Allen. It is a small convenience store located in the town of Avondale.

The four freely discussed the plan to rob Linda's or an alternative location during the next two weeks. Defendant also stated to the others that he would kill whoever was behind the counter because he wanted no witnesses. During the period before the crime, defendant sharpened his "butterfly" knife (a narrow-bladed martial arts weapon) with a diamond file. Defendant's girl friend, one of the four privy to the plan, attempted to dissuade him from his murderous plot. She had obtained some money from her parents and offered to run off with defendant but he declined.

On the evening of July 27, 1985, the four individuals were together. Defendant and his cohorts decided that the robbery of Linda's Liquors and Deli was on for that night. They all went to North Kansas City Hospital where they arrived about 10:15 p.m.

Leaving the other two, who were to secure taxis for after the robbery, defendant and Stevens left the hospital. To avoid detection they went through the woods to the deli. They carried a bag for carrying stolen merchandise. They arrived at a creek near the deli about 10:30 p.m. They observed the deli for a time because there were customers present. When the last customer had gone, they approached the deli. They took a towel out of the bag and wiped their shoes so that they would not

leave mudprints. So that the counter person, Nancy Allen, would not be suspicious, they left the bag outside.

According to their prearranged plan, defendant ordered a sandwich while Stevens went to the rest room behind the counter. Noticing that Nancy Allen was not where Stevens could easily reach her, defendant asked her for additional lettuce. When she moved to comply with the defendant's request, Stevens rushed out of the rest room and grabbed her. Defendant went around the counter and thrust his knife into her back. Defendant said he was aiming at the kidneys, which he thought would be a fatal wound.

Nancy Allen fell face down onto the floor. However, she rolled into a spread-eagled position with her back on the floor. Stevens could not find everything that he wanted to take and could not operate the cash register. He asked defendant what to do. Nancy Allen replied, directing Stevens to what he sought but this caused defendant to stab his helpless victim three more times in her chest. Two of these pierced the heart. She continued to speak, begging for her life. Defendant silenced her with four stabs into the neck, one of which opened the carotid artery.

As Nancy Allen's pierced heart oozed its life's blood into the opened cavities of her lungs and onto the floor, defendant and Stevens gathered up cash and merchandise and left the store. Defendant wiped fingerprints off the door handle before leaving. They stuffed the stolen items in the bag outside and left. Nancy Allen lay dying on the floor.

The pair met their compatriots at the hospital. They paired up and left in separate taxis for the Greyhound Bus Depot. They paired up again in a different combination and went to their common summer hangout, Sherwood Lake. The cash register coin tray was thrown into the lake and they burned the stolen checks. A week

later defendant wanted Stevens to lure "some guys" into the lake area so he, the defendant, could kill them. This action was aborted when a police officer came into the area and defendant threw the murder knife into the lake.

Street talk led the Metropolitan Major Case Squad to the defendant and his companions, and they were picked up by police on August 10th. Before taking a statement, Detective Ron Nichols advised defendant of his rights. Defendant's mother, Lt. Dave Rogers, and a juvenile officer were also present. An extremely incriminating statement was taken. The certification for 16-year-old Heath Wilkins' trial as an adult was obtained on August 15, 1985 as required by Section 211.071, RSMo Supp.1984.

The litany of Fifth Amendment rights was read again to defendant at his arraignment in circuit court on October 17, 1985. Appointed counsel Fred Duchardt of the Clay County Public Defender's Office represented Wilkins and entered a plea of "not guilty by reason of mental disease or defect excluding responsibility" or "not guilty" to all the charges against defendant. A mental examination was ordered and the results from the Western Missouri Mental Health Center were filed with the court on December 19, 1985. Defense counsel sought an additional examination, which was obtained privately at the Menninger Clinic in Topeka, Kansas. The results of that examination became available in April of 1986.

A competency hearing was set for April 16th to inquire into the competency of the defendant at the time of his act as well as his present competency to stand trial. Unknown to the court but after long discussions with attorney Duchardt, defendant reversed his position. Defendant wanted to release counsel and proceed pro se, plead guilty, waive jury trial, and actively seek a sentence of death as his penalty.<sup>1</sup> The trial

1. This is not as novel as it might sound. See Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. of Crim.L. & Criminology 553, 553 (1984) (examining cases where convicted murders voluntarily terminat-

ed appeals that would have delayed their executions). "For some on death row, however, the darkest fear is not execution, but the prospect of living out their natural years incarcerated in a six-by-nine cell, under constant surveillance,

court first became fully aware of this turn of events at the April 16th competency hearing. Dr. Steven A. Mandracchia examined the defendant on November 27, 1985 before knowing that defendant intended to seek the death penalty. However, Dr. Mandracchia's opinions about defendant's competency were unequivocal. He said "that there was no evidence of mental disease or defect as defined by chapter 552 of the revised statutes of the state of Missouri." Later, after being advised of the defendant's intention to seek the death penalty, his opinion did not change. "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities."

Dr. William S. Logan, M.D., Director of Law and Psychiatry at the Menninger Foundation, examined the defendant in March 1986 after the defendant had made his fateful decision. Attorney Duchardt had fully advised Dr. Logan of Wilkins' intentions as did the examinee himself. Dr. Logan resisted giving the categorical competency opinion that Dr. Mandracchia had given. Nonetheless, he found that the defendant had average intelligence. Moreover, although he found that Wilkins suffered from some emotional disorders of long standing, Dr. Logan "didn't see [Wilkins] as meeting the criteria for a severe mental illness as defined under the statutes of Missouri." In fact, Dr. Logan characterized "the execution of the crime as very purposeful, very deliberate, very well planned ... [with the defendant making] numerous efforts to avoid detection, showing that he appreciated the wrongfulness of it...." After hearing this testimony and interrogating defendant, the court found defendant to be competent.

Despite the finding of defendant's competency, Judge McFarland did not immediately grant his motion to proceed pro se. The right to proceed without counsel upon a voluntary and intelligent election has been recognized by the Supreme Court of the United States. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975). However, the *Faretta*

court recognized the disadvantages to a defendant who proceeds pro se. *Id.* at 834-35, 95 S.Ct. at 2540-41. Here, the trial court found itself faced with a peculiar constitutional quandary—a defendant may not be convicted and imprisoned without being accorded the right to assistance of counsel but a defendant may help himself into a conviction by his voluntary albeit inadequate self-representation. *Id.* at 832-33, 95 S.Ct. at 2539-40.

Consequently, the circuit judge took steps to ensure that the gravity and importance of defendant's decision was brought home to him. Judge McFarland explained the advantages of counsel to defendant, highlighted defendant's own inadequacies of education, age, and experience, and set the pro se hearing off for another week to ensure that defendant gave additional thought to this matter.

When the hearing resumed on April 23, 1986, the judge strongly voiced his belief that defendant should be represented by an attorney. He explained each consequence of defendant's action: the waiver of trial by jury on each charge including both phases of the murder trial, the ranges of punishment, the necessity of written waivers, as well as a detailed and vivid description of the effects of execution by poison gas. Finally, he set a pleading hearing for May 9th and admonished the defendant to talk to those whom he trusted and who could advise him about his chosen course.

On May 9th, the circuit court reconvened to consider defendant's desire to change his pleas to guilty and to waive trial. Again, the court persisted in its efforts to convince the defendant that the course was unwise. Again, the court advised him of the enormity and finality of his waivers of legal rights. Defendant politely but firmly rejected the court's advice. Judge McFarland explained that this course would probably lead the court to impose a death penalty. But, he explained that defendant might still get the life sentence. Finally, the court took evidence to substantiate a factual basis for the change of plea. At length, the court concluded that defendant unbr-

with little or no hope of ever regaining their

freedom." *Id.*

stood the consequences of his actions and that defendant voluntarily and knowingly was waiving his rights and entering guilty pleas, and the court accepted the pleas of guilty to all the charges including murder in the first degree.

At the sentencing hearing of June 27, 1986, the court entered the maximum sentences on the two lesser charges. Judge McFarland again reviewed the variety of rights available to the defendant for the asking. Defendant declined again. The court offered him a chance even at this late stage to withdraw his plea.

**The Court:** You understand that I think it would be in your best interests that you withdraw your plea?

**Defendant:** "I understand what you think, your Honor."

Evidence was taken in the sentencing stage. It amply supports the guilt of the defendant. Heath A. Wilkins stood up at his last opportunity to address the circuit court and told the court, "... I'm asking the court to consider the death penalty as a [sic] more humane in the extent of possible happenings and pain received by, you know, me.... One I fear, the other one I don't."

Judge McFarland entered his order.

The court does feel that the defendant's decision [to ask for death] was made rationally and after due thought and deliberation.... The court finds beyond reasonable doubt that the following aggravating circumstances exist: number one, the murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery; and, number two, the murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.

Section 565.032.2 subs. (1) and (7), RSMo Supp.1984 (respectively).

Counsel for defendant raise four major points and multiple sub-points in their brief. First, that the trial court erred in finding defendant competent to proceed because the evidence was inadequate and that the trial court failed to make specific find-

ings on the defendant's competency to waive his constitutional rights.

Second, counsel argued that the circuit court failed to consider mitigation at the sentencing hearing as required by the decision of the Supreme Court of the United States and the Missouri sentencing statute. Counsel also contend in their second point that the trial court erred quantitatively in weighing the aggravating circumstances it had found against the mitigating circumstances it had found. The court did not find two other aggravating circumstances beyond a reasonable doubt that had been requested for consideration by the State: "The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another." Section 565.032.2(4). "The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness." Section 565.032.2(12).

Third, the death sentence should be set aside because it is comparatively disproportionate to the penalty imposed in similar cases.

Finally, counsel contends that the death penalty is cruel and unusual per the Eighth Amendment of the United States Constitution and Article I, Section 21 of the Missouri Constitution.

[1] This Court has repeatedly rejected constitutional challenges to Missouri's death penalty provisions. *State v. Driscoll*, 711 S.W.2d 512, 517 (Mo. banc 1986) (list of citations). Similarly, the Supreme Court of the United States has held that the death penalty is not per se cruel and unusual punishment prohibited by the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 188-95, 96 S.Ct. 2909, 2932-36, 49 L.Ed.2d 859 (1976) (plurality opinion). Recent decisions have not varied from that course. See *Proctor v. Criminal Procedure*, 75 Geo.L.J. 1170 (1987). The point should be denied.



## STATE v. WILKINS

Mo. 415

Cite as 736 S.W.2d 409 (Mo. banc 1987)

[2] Counsel contends that the lower court's finding of defendant's competency was not supported by sufficient evidence; further that the trial judge failed to make a specific finding of defendant's ability to waive constitutional rights. In testing sufficiency, the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding. *State v. Brown*, 660 S.W.2d 694, 698-99 (Mo. banc 1983). This Court has observed the defendant, his demeanor, and listened to him, and the trial judge had over a period of months observed the defendant for prolonged sessions of hearings.

The psychological record is not insufficient as characterized by counsel but extensive and consists not only of the expert testimony but also the galaxy of tests, and records on which they relied, from the numerous institutions with which defendant had dealt. The basic test is whether mental illness renders the criminal defendant incompetent to stand trial because he "lacks capacity to understand the proceedings against him or to assist in his own defense." Section 552.020.3(1), RSMo Supp.1984; see *Winick, Restructuring Competency to Stand Trial*, 32 U.C.L.A. L.Rev. 921, 923 (1985). The overwhelming and uncontroverted evidence on this record establishes that defendant has met and continues to meet this basic test.

[3] Counsel urge that there should be a heightened test of competency in this case. Although an incompetent, as a juvenile, may be impaired by his limited cognitive and social capacities, cf. *Winick, supra*, at 961 (discussing various situations in which a defendant may waive his incompetency status), Judge McFarland could not have been more unbiased, reasonable and fair in his consideration of competency. Any finding of competency necessarily entails the

2. See *Burger v. Kemp*, — U.S. —, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) and dissenting opinion of Powell, J., at 5143. Issue was alleged ineffective assistance of counsel. Defendant was 17-years-old at time of murder, had an I.Q. of 82, functioned at a 12-year-old level, and had possible brain damage from beatings when he was child.

ability to waive certain rights beginning with the very first strains of *Miranda*. *Id.* at 961 (juveniles may validly waive both self-incrimination and right to counsel privileges). Moreover, and analogous to the threshold question of competency to stand trial, Missouri law presumes competency, as all persons are presumed to be free of mental disease or defect which would exclude their responsibility for their conduct. Section 552.030.7, RSMo Supp.1984. The point is denied.

[4] In the second point it is contended that the trier failed to consider mitigation as required by state statute, Section 565.030.4, RSMo Supp.1984, and by *Eddings v. Oklahoma*, 455 U.S. 104, 110-14, 102 S.Ct. 869, 874-77, 71 L.Ed.2d 1 (1982). This claim is not supported by the record. The trial judge clearly indicates that he considered mitigating factors in addition to defendant's age in the required trial report. Defendant was 16 years and seven months old when he murdered Nancy Allen. He was 17 years and four months old when he pleaded guilty. He had completed nine years of education and had an intelligence quotient of 105.<sup>2</sup>

The report of the trial judge shows that he considered whether the murder "was committed while the defendant was under the influence of extreme mental or emotional disturbance." Section 565.032.3(2), RSMo Supp.1984. Second, he considered whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Section 565.032.3(6).

Counsel suggest that the weighing of mitigating factors is a quantitative or tallying process. Clearly it is not. For example, the trier must assess the punishment in a capital murder case at life imprisonment "[i]f the trier finds the existence of one or

*Thompson v. State*, 724 P.2d 780 (Okla.Crim. App.1986) (defendant 15-years-old at time of murders), *cert. granted*, — U.S. —, 107 S.Ct. 1284-85, 94 L.Ed.2d 143 (1987), to consider whether Eighth Amendment imposes an age limitation on the application of the death penalty.

more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier." Section 565.030.4(3), RSMo Supp.1984. Just one mitigating factor might permissibly outweigh several aggravating circumstances under this provision and require the imposition of only life imprisonment and not the death penalty. But the reverse is also true. The trier may find that a single aggravating circumstance beyond a reasonable doubt "warrant[s] imposing the death sentence." Section 565.030.4(2). The trier's judgment as to the appropriateness of the sentence must be guided but is still discretionary. The weighing process is a qualitative one not a quantitative one. The trial court considered all the mitigating circumstances fairly presented by the evidence and did not find that they outweighed the aggravating circumstances found beyond a reasonable doubt. The point is denied.

Counsel in point three ask us to do no more than what this Court is mandated to do. Section 565.035, RSMo Supp. 1984. The court must review whether the imposition of the death penalty was influenced by passion or prejudice, was supported by evidence of the statutory aggravating factors enumerated by the trier of fact, or was disproportionate or excessive when compared to similar cases. See *State v. Battle*, 661 S.W.2d 487, 493-95 (Mo. banc 1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984).

[5, 6] The record bears no suggestion of prejudice, passion or any other arbitrary factor. The trial court's patience and fair-play were well-demonstrated throughout. Similarly, the evidence supports his finding that defendant Wilkins committed the murder of Nancy Allen in a wantonly vile, horrible and inhuman manner. With cool, deliberate premeditation he remorselessly executed the prone, helpless Nancy Allen, who had ample time to consider her demise, her husband, and her one-year-old and three-year-old girls. Defendant brutally silenced her pleas for mercy. The defendant freely admits that he committed this murder during a robbery, which supports the

other aggravating circumstance found by the trier. The death penalty was not influenced by passion or prejudice and the evidence supports the trial court's finding of two aggravating circumstances beyond a reasonable doubt.

[7] Finally, we are required to consider whether this sentence of death is disproportionate to the penalty imposed in similar cases considering both the circumstances of the crime and the defendant. *State v. Foster*, 700 S.W.2d 440, 445 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986). The cases the Court has reviewed demonstrate the penalty of death imposed here is not excessive or disproportionate to similar cases.

In *State v. Foster*, 700 S.W.2d 440, 441 (Mo. banc 1985), defendant, with an accomplice, planned an armed robbery of the apartment of two acquaintances. The jury in *Foster* found four aggravating circumstances, including two which are essentially identical to those found in the instant case—a murder involving depravity and a murder for gain. Death was imposed. *Id.* at 445.

In *State v. Lashley*, 667 S.W.2d 712, 716 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), defendant was 17 years and one month old at the commission of the murder. Defendant with the intention of robbing the victim had stabbed the victim who did not die at the instant of attack. Lashley had been committed to various institutions and was considered to be of average intelligence. The death penalty was imposed.

In *State v. Newlon*, 627 S.W.2d 606, 609-10 (Mo. banc), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982), an armed defendant entered a store with his accomplice after waiting for customers to leave so that the lone attendant would be isolated. Defendant entered knowing that the attendant might be killed after an accomplice's remark before they entered the store. The trier found that the murder was wantonly vile. *Id.* 627 S.W.2d at 621. The death penalty was imposed.

See also *State v. Johns*, 679 S.W.2d 253 (Mo. banc 1984), *cert. denied*, 470 U.S.

1034, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985); *State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); and *State v. Malone*, 694 S.W.2d 723 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2292, 90 L.Ed.2d 733 (1986).

Aside from the general principles of deterrence, defendant's execution-murder of Nancy Allen is exceptional in its brutality. Unlike any of the cited cases except *Newlon*, the evidence herein demonstrates an express premeditated plan on defendant's part to kill anyone and everyone he found at Linda's Liquors and Deli to eliminate potential witnesses. This was no spur of the moment decision on defendant's part, but planned. Although the victim in this case was immediately assaulted when the robbery began, she had a substantial time in which to anticipate her fate and to plead for her life. Cf. *State v. Newlon*, 627 S.W.2d at 622. The suffering of the victim is certainly a factor in comparing this with other cases. *State v. Smith*, 649 S.W.2d 417, 434-35 (Mo. banc), *cert. denied*, 464 U.S. 908, 104 S.Ct. 282, 78 L.Ed.2d 246 (1983). Even after inflicting a mortal wound upon Nancy Allen, defendant was not content to let her die. He inflicted further mutilation upon her by stabbing her repeatedly in the throat to stop her from talking. Cf. *State v. Johns*, 679 S.W.2d at 257; and *State v. Malone*, 694 S.W.2d at 724. As all of these facts demonstrate, the murder at bar is substantially more heinous than past killings which have been found to justify a sentence of death.

Another factor supporting defendant's sentence, newly recognized in Missouri's 1984 revision of the homicide statutes, is the strength of the evidence against him. Section 565.035.3(3). Heinous murders have been committed in the past in which the evidence of the crime was circumstantial and the precise role of the accused in the killing was unclear; in such cases, an inference exists that the jury may have rejected a sentence of death for that reason. See, e.g., *State v. Turner*, 623 S.W.2d 4, 6-7 (Mo. banc 1981), *cert. denied*, 456 U.S. 931, 102 S.Ct. 1982, 72 L.Ed.2d 448 (1982); and *State v. Mitchell*, 611 S.W.2d

223, 224-25 (Mo. banc 1981). Such is not the case here. Defendant has admitted and described in great detail his dominant role in the killing of Nancy Allen from his planning of the murder in advance to his stabbing the victim to death, and his account is corroborated by autopsy evidence and the crime scene. By definition, the evidence of defendant's guilt could not be any greater than it is in a plea of guilty.

The final and a most chilling factor to be considered is the nature of defendant himself and his attitude toward human life. In his words, Nancy Allen was a "trash can" whose most convenient disposition was to be killed so she would not be "a bother" to defendant in the future. As evidenced by his actions, this statement by defendant is not mere bravado because he had made a prior and unconditional decision to kill the witnesses to his planned robberies and he had no reason to kill Nancy Allen other than the possibility that she might later testify against him. This was only one of a series of robberies and murders that defendant had intended to commit had he not been apprehended, and he had made attempts to kill people, including his mother, both before and after the Nancy Allen murder. There can be no doubt that, given defendant's attitude, he will unhesitatingly kill anyone who "gets in his way" unless and until he is prevented from doing so by the forces of civilized society. The sentence of death imposed upon defendant is the only reliable means of achieving that aim.

The judgment is affirmed.

ROBERTSON, RENDLEN and HIGGINS, JJ., concur; BLACKMAR, J., dissents in separate opinion filed; DONNELLY, J., dissents in separate opinion filed; WELLIVER, J., dissents in separate opinion filed and concurs in dissenting opinions of BLACKMAR and DONNELLY, JJ.

BLACKMAR, Judge, dissenting.

For the reasons assigned by Judge Billings the points raised by appointed counsel are without substance. The trial judge is

to be commended for his fair and balanced handling of a very difficult situation.

Judge Billings expounds the deliberateness and atrocity of the killing. Judge Donnelly, in his dissenting opinion, demonstrates the vagaries in jury sentencing, describing killings which are no less repulsive, but in which the jury did not assess the death penalty. He senses a tendency to assess life rather than death when the offender is very young. I cannot add to the meticulous scholarship of both of my brethren.

Section 565.035.2, RSMo 1986, effective 10-1-84, directs us to "consider the punishment..." Pursuant to this obligation, I would hold that a defendant who was a juvenile at the time of the offense should not be subject to the death penalty. In *State v. Battle*, 661 S.W.2d 487, 495 (Mo. banc 1983) and *State v. Lashley*, 667 S.W.2d 712, 717 (Mo. banc 1984), I argued unsuccessfully against death sentences for minors. I would draw a line at the juvenile level. Lines must be drawn somewhere; the offender below fourteen may not be punished as a criminal. See Section 211.071, RSMo 1986. The death sentence should be reserved for those capable of mature deliberation. See Ellison, "State Execution of Juveniles: Defining 'Youth' as a Mitigating Factor for Imposing a Sentence of Less than Death," 11 Law and Psychology Review 1 (Spring, 1987).

It is suggested that my position is contrary to state policy as defined by the legislature, inasmuch as the statutes contain no prohibition on the execution of persons who were juveniles at the time of commission of the offense. I believe that the duties imposed on us by Section 565.035.2 authorize us to adopt some objective standards for imposition of the death penalty. I also submit that our duties under that section are in addition to the duty of comparison imposed by 565.035.3, and that we should undertake a broader review of death sentences than we have in the past.

1. Defendant filed no after-trial motions or notice of appeal in this case. Counsel appointed to represent defendant in proceedings before this Court have briefed and argued numerous points of law. We decline to review these at this time,

I concur with Judge Donnelly as to the remaining issues discussed in his dissenting opinion.

DONNELLY, Judge, dissenting.

Mandatory review under section 565.035, RSMo 1986.<sup>1</sup>

In this case, defendant entered pleas of guilty and expressed a desire to be put to death. The Court conducts its mandatory review, § 565.035, RSMo 1986, of a sentence of death, imposed following a hearing to determine punishment, § 565.032.2, RSMo Cum.Supp.1983. For reasons stated, we reduce sentence to life imprisonment without possibility of probation or parole, barring executive act.

The facts are undisputed, drawn from defendant's statements to a police investigator and to the trial court during the sentencing phase, from reports and testimony of psychiatrists who examined defendant, and from the report of a presentence investigator. On the night of the fatal stabbing of Nancy Allen, defendant Wilkins was aged sixteen years, six months, twenty days. For about a month previous, he had been living on the streets of Kansas City with three other juveniles, Pat "Bo" Stevens, Roy "Shades" Thompson, and Marjorie "Midget" Filipiak. At Wilkins' initial suggestion, the foursome plotted to rob area businesses. Defendant proposed, and the group acceded to, Linda's Liquor & Deli in Avondale as an initial target. Wilkins maintained he would kill anyone present to conceal the perpetrators' identities. To facilitate his claimed objective, Wilkins purchased a narrow-bladed, martial arts knife from Stevens with money defendant had stolen from a laundromat.

As preconceived one to two weeks before, an intricate plan unfolded July 27, 1985. At or near 10:15 p.m., the four juveniles met at North Kansas City Hospital. Defendant and Stevens walked through a

given our disposition of the case. We intend no suggestion as to the merit of counsel's claims which may be grounds for post-conviction relief under Rule 27.26; defendant may pursue such relief at his option.



wooded area to the nearby deli, leaving Filipiak and Thompson at the hospital to await their return. The two boys stalked the target from along a neighboring creek while customers transacted business in the store and left. It was nearing closing time. Around 11:00 or 11:30 p.m., toting a change of clothes apiece in defendant's handbag, the two youths executed the crime. The handbag was left outside the deli to avert suspicion; both boys wiped mud from their shoes to avoid leaving footprints inside. Nancy Allen, the store clerk, was alone, seated behind the counter, when the boys entered. Wilkins ordered a sandwich. Stevens asked to use the restroom. When Stevens exited, he grabbed the victim, holding her while Wilkins rushed forward, produced the knife, and stabbed her in an area of her back he thought to be her kidney. Allen fell to the floor. Lying on her back, the victim responded to a question Stevens put to her, and began pleading with defendant not to kill her. Wilkins told Allen to be quiet, then stabbed her repeatedly in the chest and throat areas. Expert medical testimony indicated Mrs. Allen probably was deceased before Wilkins imparted the last wound to her body.

Stevens pilfered cash, checks, liquor, cigarettes and rolling papers from the cash register and store displays. Roughly \$450.00 in cash and checks were taken. Stevens then "freaked out," and defendant had to push him out the door. Wilkins wiped Stevens' fingerprints from the door-knob before the pair made their immediate flight.

Defendant and Stevens rendezvoused with Filipiak and Thompson at the hospital. To evade any pursuit, the foursome left the hospital in cabs Filipiak summoned from two local cab companies. The juveniles rode in pairs to a Kansas City bus depot. There, they talked a while, divided the stolen cash, and the principals changed clothes. Stevens and Thompson left, again

in a cab. Wilkins and Filipiak lagged behind about an hour to play video games, then left by the same means. The four met back at the lake area they frequented in Penguin Park and "tripped out." They used the stolen checks to start a fire. Defendant used his share of the money to buy drugs.

About a week later, Wilkins encouraged Stevens to lure "some guys" into the lake area so defendant could kill them. This plan was aborted when a patrolling police officer happened into the area. Wilkins threw his knife into the lake to avoid discovery. The weapon never was found.

Defendant was arrested August 10, 1985. He acquiesced to giving a statement, in which he admitted to and described in detail the deli store murder.

As indicated above, this case comes to the Court in a peculiar posture. Wilkins was certified to be tried as an adult and was appointed counsel, Mr. Frederick Duchardt. In late January or early February 1986, Wilkins informed Duchardt that he wished to withdraw an earlier plea, not guilty and not guilty by reason of mental disease or defect, and substitute pleas of guilt to all charges.<sup>2</sup> Defendant also expressed a desire to seek the death penalty as his punishment. Counsel refused to aid Wilkins in this sordid goal.

Two psychiatrists and a clinical psychologist investigated defendant's competence to stand trial through interviews and testing. On considering the psychiatrists' testimony at an April 16, 1986, hearing, the trial court found Wilkins competent to proceed. Wilkins immediately moved, *pro se*, to represent himself before the court. One week later, the court accepted defendant's written waiver of counsel.<sup>3</sup> Mr. Duchardt was discharged from representation, but the court ordered him to remain available to answer any legal questions defendant might have.<sup>4</sup>

2. Wilkins was charged with first degree murder, § 565.020.2, RSMo 1986; armed criminal action, § 571.015, RSMo 1986; and unlawful use of a weapon, § 571.030.1, RSMo 1986.

3. The court constantly reminded defendant of the wisdom of professional representation throughout these proceedings.

4. The Court commends Mr. Duchardt's service to the court below, under what undoubtedly were frustrating circumstances.

Wilkins immediately announced his desire to enter guilty pleas to all charges. The court attempted to dissuade him, to the point of describing how lethal-gas executions were performed. Defendant was encouraged to "talk to other people about this decision you're having to make," and the cause was continued until May 9, 1986. Wilkins persisted. When the case was resumed, he offered written petitions to enter the desired pleas. After extensive questioning, during which the trial judge offered defendant every opportunity to change his mind, the pleas were accepted as to each count. Sentencing was scheduled for June 27.<sup>5</sup>

Wilkins was given maximum sentences for the lesser offenses: five years' imprisonment for unlawful use of a weapon, life imprisonment for armed criminal action. The court then considered evidence on the appropriate sentence for Nancy Allen's murder.<sup>6</sup> In a bizarre climax to the proceedings, both prosecutor and defendant urged the ultimate sanction. Defendant realized his goal—the court passed a sentence of death. Supporting the sentence imposed, it found as aggravating circumstances that: 1) Defendant was engaged in perpetrating a felony (robbery) when the murder was committed, § 565.032.2(11); 2) The murder was outrageously or wantonly vile, horrible or inhuman, since it reflected depravity of mind, § 565.032.2(7).

Neither the record nor counsel suggest the sentence imposed reflects the least hint of passion, prejudice or arbitrariness. § 565.035.3(1), RSMo 1986. Moreover, the record supports the court's conclusions under section 565.032.2(7) & (11), RSMo 1986. We turn, therefore, to the dispositive question, "whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both

the crime, the strength of the evidence and the defendant." § 565.035.3(3), RSMo 1986. Under the facts of this case, in light of Wilkins' age as of the offense, his prolific abuse of drugs and alcohol, and his long history of mental and emotional affliction, we hold the sentence excessive and disproportionate, and reduce that sentence to one of life imprisonment without possibility of probation or parole, barring executive clemency. § 565.035.5(2), RSMo 1986.

Relevant cases for a review of the appropriateness of the sentence are those in which the judge or jury first found the defendant guilty of capital murder and thereafter chose between death or life imprisonment without the possibility of parole for at least fifty years.

*State v. Bolder*, 635 S.W.2d 673, 685 (Mo. banc 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1984).

First, we consider defendant's age. In four capital cases involving youths of comparable age, a life sentence was imposed. *State v. Greathouse*, 627 S.W.2d 592 (Mo. 1982) (defendant age seventeen); *State v. Allen*, 710 S.W.2d 912 (Mo.App.1986) (defendant age sixteen); *State v. White*, 694 S.W.2d 802 (Mo.App.1985) (defendant age seventeen); *State v. Scott*, 651 S.W.2d 199 (Mo.App.1983) (defendant age sixteen). Only one Missouri youth has been sentenced to die who was seventeen years old or younger as of his crime. *State v. Lashley*, 667 S.W.2d 712 (Mo. banc), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

In *Greathouse*, *Allen*, *White*, and *Scott*, the jury was instructed on defendants' lack of prior criminal activity as a mitigating factor reference sentence. In this sense, the case *sub judice* is distinct.<sup>7</sup> But the jury was similarly instructed in *State v.*

5. Indicative of the leeway the trial judge afforded Wilkins, the court informed that in the interim it would consider any change of heart Wilkins entertained reference his plea to the murder charge. Defendant remained firm in his intention.

6. Defendant waived trial by jury for the penalty phase of his murder trial. See § 565.030.4, RSMo 1986.

7. Wilkins, from an early age, engaged in arson, burglaries, and stealing. These activities were before the court for its consideration during sentencing, embodied in Wilkins' juvenile records. § 211.321.1, RSMo 1986.

*Battle*, 661 S.W.2d 487 (Mo. banc 1983), cert. denied, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984) (defendant aged eighteen years, four months; no significant history of criminal activity; death sentence affirmed), and *State v. Blair*, 638 S.W.2d 739 (Mo. banc 1982), cert. denied, 459 U.S. 1188, 103 S.Ct. 838, 74 L.Ed.2d 1030, reh'g denied, 459 U.S. 1229, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983) (defendant eighteen; same history and sentence). As to this age group of offenders, then, the absence, and thus presence, of a significant history of criminal acts may be an unreliable predicate for proportionality review. As to this age group of offenders, perhaps the most to be said is that age as a mitigating factor, § 565.030.3(7), RSMo 1986, standing alone, is insufficient to overturn a death sentence, on grounds the penalty is excessive or disproportionate, once the trier of fact has passed such sentence. *State v. Lashley*, 667 S.W.2d 712 (Mo. banc), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *State v. Battle*, 661 S.W.2d at 494-95.<sup>8</sup>

Next, we look to cases in which death was imposed on a young offender and make comparison based on the nature of the killing. In *State v. Battle*, 661 S.W.2d 487 (Mo. banc 1983), cert. denied, 463 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984), defendant, eighteen, stabbed an eighty-year old woman with a twelve-inch butcher knife. The mortal wound was inflicted just below the victim's left eye. The elderly woman, "naked, beaten and ravished," suffered nearly three hours before she died. The jury recommended the death penalty, after being instructed only on the "vile, horrible or inhuman" nature of the killing as an aggravating circumstance. See § 565.032.2(7), RSMo 1986. *Battle* is different from this case. Nancy Allen was not sexually abused before or after the murder, compare *State v. White*, 694 S.W.2d 802 (Mo.App.1985) (indications victim may have been sexually molested after death; defendant, seventeen, received life

sentence), with sub judice and *Battle*; and, no evidence indicated Mrs. Allen suffered for any prolonged period after Wilkins attacked her. Indeed, the coroner indicated she may have been dead by the time defendant imparted the last wound. Certainly this killing, however senseless, was no more repulsive than those involved in *State v. Beck*, 687 S.W.2d 155 (Mo. banc 1985), cert. denied, — U.S. —, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986) (nineteen-year old shot and killed elderly couple; life sentence); *State v. Greathouse*, 627 S.W.2d 592 (Mo.1982) (seventeen-year old struck uncle with ax, then shot him eight times; life sentence); *State v. Baskerville*, 616 S.W.2d 839 (Mo.1982) (nineteen-year old; triple-murder, life sentence); *State v. Allen*, 710 S.W.2d 912 (Mo.App.1986) (sixteen-year old, given life imprisonment; insisted after robbing couple, aged 67 and 68, that they be killed "the way Muslims kill people—by tying 'their ankles (?) to their feet'", laying each on stomach, then stabbing each in back of neck); *State v. Hurt*, 668 S.W.2d 206 (Mo.App.1984) (nineteen-year old, penitentiary inmate, killed cellmate by stabbing him more than sixty times; life term imposed); *State v. Scott*, 651 S.W.2d 199 (Mo.App.1983) (sixteen-year old; life imprisonment; robbed elderly couple at gunpoint, then stabbed wife twenty-two times; husband, also stabbed multiple times, survived).

In *State v. Lashley*, 678 S.W.2d 712 (Mo. banc), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), the victim was stabbed in an area of her head where a section of skull had been surgically removed, exposing a "soft spot." Defendant was "seventeen years and one month old" as of the killing. His motive was to rob his fifty-five-year old, handicapped cousin; he did so in a manner described as "classic lying in wait." *Id.* 678 S.W.2d at 716. Wilkins' crime fits this genre. See § 565.032.2(4), RSMo 1986. But more is involved

lev state the law in Missouri barring contrary adjudication in the United States Supreme Court. See *Thompson v. Oklahoma*, — U.S. —, 107 S.Ct. 1284, 94 L.Ed.2d 143 cert. granted, — U.S. —, 107 S.Ct. 1284-85, 94 L.Ed.2d 143 (1987).

here, making *Lashley* distinct.<sup>9</sup> In none of the above, *Lashley*, *Battle*, *Blair*, *Beck*, *Greathouse*, *Baskerville*, *Allen*, *Scott*, *Hurt*, or *White*, was the nature of the defendant such as to raise serious question, as here, whether the defendant should be held so completely responsible for his conduct that we should affirm his sentence.<sup>10</sup>

At age ten, Wilkins was referred to Tri-County Mental Health Center. For the next four to five years, excepting a seven-month probationary period at home, defendant underwent evaluation, treatment and detention at various Missouri institutions. He was diagnosed as possessing a borderline personality, schizotypal personality, and perhaps developing schizophrenia.<sup>11</sup> He was withdrawn, isolated, depressed, impulsive, displaying intermittent episodes of paranoid functioning. On at least two occasions, he was prescribed antipsychotic medication. Officials at Crittenton Center expressed concern that defendant was at risk for violent, destructive, or self-destructive acts.<sup>12</sup> Indeed, Wilkins had on a number of occasions attempted suicide by cutting his wrist, overdosing on medication or illegal drugs, and leaping from a bridge into the path of a passing car.

Dr. Logan, who examined defendant to determine his competence to proceed below, intimated that Wilkins' heavy drug use was tied to his cognitive functioning.<sup>13</sup> Dr.

Parwatikar, who interviewed Wilkins at this Court's instance to determine his competency to waive appellate counsel, suggested defendant's youth, in turn, was a feature which distinguished his mental and emotional make-up from a mere antisocial condition.

Dr. Logan testified below that Wilkins "suffered from an ongoing emotional disturbance" of "profound" proportion; he reported that defendant's actions on July 27, 1985, could not be divorced from his psychopathology. Even though Wilkins' condition could not be termed a legally recognized mental disease or defect, Chapter 552, RSMo 1986, Logan submitted in his report that:

This is not to say that defendant did not suffer from significant impairment in his mental functioning as a result of mental disease which at the time of the crime hindered his emotional realization of the nature, quality, and wrongfulness of his conduct, and hindered his cognitive control of his conduct . . .

On these facts, considering defendant's age, and his significant cognitive-emotional disorder, and connected, extensive drug abuse, we hold the sentence excessive and disproportionate. Consistent with this holding, we reduce Wilkins' sentence to life imprisonment without possibility of probation or parole barring executive act.<sup>14</sup>

9. We also note "the issue . . . is not whether any similar case can be found in which the jury imposed a [death] sentence, but whether the death sentence is excessive or disproportionate in light of similar cases as a whole." *State v. Mallitt*, 722 S.W.2d 527, 542 (Mo. banc 1987).

10. We do not ignore the carefully-planned and carefully-executed nature of this heinous offense. Nor do we take lightly defendant's apparent disregard for the lives of others. We find only that Wilkins' age, his mental and emotional instability, and extensive drug use coagulate, inseparably, to quicken the conclusion, in our view the only conclusion, that the ultimate price is an excessive one to be levied on this defendant.

11. Wilkins' brother was diagnosed a schizophrenic in 1982. His father was committed for a period of time in an Arkansas mental facility. On these bases, one examining psychiatrist suggested defendant's dysfunctioning may have a genetic component.

12. Examining psychiatrist William Logan indicated these actions were intimately bound with defendant's disorder.

13. Defendant had used marijuana since he was five. He had abused inhalants, stimulants and depressants since age six. In the three summers prior to 1981, he estimated he had inhaled gasoline fumes on about 500 occasions. Since at least age ten or eleven, Wilkins had used LSD, by admission his favorite drug. On July 27, 1985, defendant ingested a home-made strain of the drug three times, the last at around 7:30 p.m. We find this drug use significant only to the extent it was a product of Wilkins' disorder, and to the extent it lends greater force to our conclusion, considered in tandem with the other factors we find persuasive in reducing sentence.

14. Defendant's desire to obtain the death penalty is noteworthy only in that we find it impertinent to this or any review under section 565.035. This Court will not permit a defendant to employ the judicial process as a vehicle for state-aided suicide.

After argument and submission, this cause was assigned to me for opinion. That opinion, which is set forth above, was rejected by the majority of the Court.

I respectfully dissent.

WELLIVER, Judge, dissenting.

I respectfully dissent. The principal opinion treats this case as though it were here on appeal, which it is not, and in my opinion, glosses over our statutory duty to make examination as to proportionality of the sentence. § 565.035.3(3), RSMo 1986. I concur in the separate dissenting opinion of Blackmar, J. and the separate dissenting opinion of Donnelly, J.

The record before us is a documentary of defendant-"appellant's" exposure to and his failure to respond to almost every known social program of this society during the first almost seventeen years of his life. Regardless of the current belief of many that the death penalty is a deterrent to crime, utilization of the death penalty in cases such as this only serves to bury and cover up the failures of our existing social and penal programs. The death penalty was never intended to punish crimes committed by juveniles and is totally disproportionate to the punishment of similar crimes committed by those of similar age. See cases cited in separate opinions of Donnelly, J. and Blackmar, J. The punishment should be reduced to life imprisonment.



IN THE  
MISSOURI SUPREME COURT

STATE OF MISSOURI,                   +  
                                      )  
Respondent,                        )  
                                      )  
vs.                                    ) No. 68393  
                                      )  
HEATH W. WILKINS,                 )  
                                      )  
Appellant.                         )

MOTION FOR REHEARING

Comes now appellant, Heath W. Wilkins, by and through undersigned counsel, and pursuant to Rule 30.26, respectfully requests the court to grant his motion for rehearing and states as grounds therefore as follows.

1. Appellant pleaded guilty to first degree murder, Section 565.020.1, RSMo Cum. Supp. 1984, in the Circuit Court of Clay County, Missouri, and was sentenced to death.

2. Appellant, proceeding pro se, took none of the prescribed steps to appeal his guilty plea and death penalty. This Court however, requested the State Public Defender to enter the case as amicus curiae and to brief and argue the case.

3. After argument, this Court ordered appellant examined by the Department of Mental Health of Missouri to determine appellant's competence to waive counsel on appeal.

4. Based upon Dr. S.D. Parwatikar's conclusion that appellant "suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his constitutional rights and represent himself in front of the court," this Court set aside the submission and appointed counsel to represent appellant.

5. Appellant's conviction and sentence were affirmed on September 15, 1987.

6. Appellant asserts that the death penalty is cruel and unusual punishment under any circumstances. More specifically appellant asserts that in affirming his conviction and sentence, the Court overlooked material matters of fact and law.

7. The Court's opinion gives a recitation of the facts of the case, slip op. at 3-6, and then uses those facts to find that the sentence of death in this case is not disproportionate to the punishment of similar crimes, slip op. at 15-19. In so doing, the Court overlooks the fact that appellant himself provided all of the facts on which the Court depends and that at the time many of these statements were made, he was actively seeking the death penalty. The Court further overlooks appellant's long history of mental/emotional disturbance which in combination with his desire for death, may well have affected the accuracy of, and motivation for, making such statements.

8. In a footnote, slip op. at 7, n.1, the Court states that appellant's decision to "release counsel and proceed pro se, plead guilty, waive jury trial, and actively seek a sentence of death" is not as novel as it might sound, citing, Wrofsky, A Right to Die: Termination of Appeal for Condemned Prisoners, 75 J. of Crim.L. and Criminology 553 (1984). In so stating, the Court overlooks the fact that at the time he made these decisions, the sixteen-year-old appellant had never been in prison or on death row and therefore his decision to seek death was not based on an actual, rational, comparison of two, equally



horrible options. In fact, since the appellant gave up his right to a trial by jury, it cannot be said with certainty that he did not choose death over a sentence much less severe than "living out [his] natural years incarcerated in a six-by-nine cell, under constant surveillance, with little or no hope of ever regaining [his] freedom." Id. In addition, as a civilized society we should be concerned by the fact that conditions on death row are so inhumane that death becomes the preferable option for some death row inmates.

9. The Court's opinion misinterprets appellant's argument concerning the need for a separate inquiry into his competence to waive his constitutional rights to the assistance of counsel and trial by jury. Appellant's argument as to this issue is in no way grounded on the fact that he is a juvenile, slip op. at 13. Nor is appellant challenging the fairness or reasonableness of the trial judge, id. Instead, appellant asserts that the procedure used, and the evidence adduced, by the trial court to determine appellant's competence in this case were inadequate. The information available to the trial court at the time he allowed appellant to proceed pro se and plead guilty should have alerted him to the fact that appellant's competence was still an issue and that further evidence and findings were appropriate and necessary.

10. In holding that no heightened test of competency was required in this case, slip op. at 13, the Court's opinion is in conflict with Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1310, 16 L.Ed.2d 429 (1966) wherein the Supreme Court held that due

process required a separate hearing or inquiry into the defendant's competence to waive his constitutional right to the assistance of counsel even though the defendant had received a hearing on the issue of his competence to stand trial. If competence to stand trial is judged by the same standard as competence to waive constitutional rights, the Supreme Court's opinion in Westbrook makes no sense.

11. The court's opinion also overlooks Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) wherein the United States Supreme Court held that a defendant facing the death penalty would not be allowed to withdraw his certiorari petition and forego further legal proceedings unless the Court was satisfied that he had,

capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or whether he is suffering from mental disease, disorder or defect which may substantially affect his capacity in the premises.

Id. 384 U.S. at 314. Appellant abandoned further legal proceedings at a much earlier stage than did the defendant in Rees. Although he was required to appear before the circuit court judge<sup>1</sup> for his plea and sentencing, the record makes it abundantly clear that appellant was not interested in challenging, but was in fact actively seeking, the death sentence he received. The Supreme Court's decision in Rees mandates a heightened test of competency given the facts of appellant's

<sup>1</sup> Appellant joins the Court in its admiration of Judge McFarland and wishes to make clear that no claim of bias or unreasonableness on the judge's part has ever been raised in this case.

case.

12. In denying appellant's second point the Court finds that, "[t]he trial judge clearly indicates that he considered mitigating factors in addition to defendant's age in the required trial report." Slip op. at 13. The Court overlooks the fact that nowhere, on the record, does the trial court indicate what mitigating factors he considered when sentencing appellant to death. That these findings were included in the trial court's report to this Court does little to assure that they were considered at the time sentence was imposed. In addition, a number of United States Supreme Court cases hold that the sentencer must consider, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, 476 U.S. \_\_\_, 106 S.Ct. 90 L.Ed.2d 1 (1986). Given the unique posture of this case, the trial court had an obligation to consider all of the evidence available to it, and not to allow the appellant, by objection, to keep certain, potentially mitigating evidence, away from his consideration.

13. In finding that the evidence supported the finding that the murder of Nancy Allen was wantonly vile, horrible and inhuman, slip op. at 15, the Court overlooks a fact that it had found earlier, that is appellant's statement that he had aimed at her kidneys, thinking it would be a fatal blow, slip op. at 4.

The majority opinion also overlooks the fact that "no evidence indicated Mrs. Allen suffered for any prolonged period after [appellant] attacked her. Indeed, the coroner indicated she may have been dead by the time [appellant] imparted the last wound." Slip op., dissenting opinion, Donnelly, J. at 7.

14. In its mandatory proportionality review the Court states that the final, and most chilling factor to be considered is the nature of appellant himself, slip op. at 18-19. The Court specifically finds that the appellant had little regard for the value of human life. In so finding, the Court overlooks the evidence of appellant's repeated expressions of deep remorse for what he has done, specifically his recognition of the harm he has caused Nancy Allen and her family.

In addition, the only evidence in the record which supports the Court's conclusion that appellant had made a prior and unconditional decision to kill the witnesses to his allegedly planned series of robberies is the appellant's own, self-serving statements (see para. 7, *infra*). Finally, there is no evidence that appellant actually attempted to kill people either before or after the murder of Nancy Allen.<sup>2</sup>

15. In finding that the sentence of death in this case was not disproportionate to the punishment for similar crimes, slip

<sup>2</sup> In his report, Dr. Logan wrote "He [appellant] recalled a plot to poison the mother so she would get sick and break up with the boyfriend. The plot concerned putting poison in Tylenol capsules." Dr. Logan's report at 3.

op. at 15-19, the Court's opinion overlooks appellant's age<sup>3</sup> at the time of the offense, his prolific abuse of drugs and alcohol, and his long history of mental and emotional affliction.

WHEREFORE, for the reasons stated herein, appellant respectfully requests this Court to grant his motion for rehearing.

Respectfully submitted,

Nancy A. McKerrow  
Nancy A. McKerrow, MOBar# 32212  
Attorney for Appellant  
209B East Green Meadows Rd.  
Columbia, MO 65203-3698  
(314) 442-1101

CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing motion was mailed postage prepaid this 23<sup>rd</sup> day of September, 1987, and sent by way of first class mail to the Office of Attorney General, P.O. Box 899, Jefferson City, MO 65102.

Nancy A. McKerrow  
Nancy A. McKerrow

<sup>3</sup> Whether sentencing a minor to death constitutes a per se violation of the Eighth Amendment is a question currently under consideration by the United States Supreme Court. See Thompson v. Oklahoma, No. 86-6167, cert. granted, 107 S.Ct. 1204-85 (1987).



CLERK OF THE SUPREME COURT

STATE OF MISSOURI

POST OFFICE BOX 150

JEFFERSON CITY, MISSOURI

65102

October 13, 1987

THOMAS F. SIMON  
CLERK

TELEPHONE  
(314) 751-8148

Ms. Janet M. Thompson  
Ms. Nancy A. McKerrow  
Office of State Public Defender  
209B East Green Meadows Road  
Columbia, Missouri 65203

Re: State of Missouri vs. Heath A. Wilkins,  
No. 68393

Dear Ms. Thompson and Ms. McKerrow:

This is to advise that the Court has this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled.  
Execution set for December 17, 1987."

Very truly yours,

Thomas F. Simon  
Clerk

cc: Attorney General



No. 68393  
Circuit Court No. CR185-491FX  
In the Supreme Court of Missouri

September Term, 1987

State of Missouri, Respondent,  
vs. Appeal from the Circuit Court of Clay County  
Heath A. Wilkins, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Clay County rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said HEATH A. WILKINS

appellant herein, by the said Circuit Court of Clay County be in all things executed on Thursday the 17th day of December, 1987.

(Opinion filed.)

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1987, and on the 15th day of September 1987, in the above entitled cause.

Given under my hand and seal of said Court, at the City of

Jefferson, this 15th day of

September 1987

Thomas F. Simon, Clerk

Deputy Clerk



Supreme Court of Missouri

en banc

August 23, 1986

STATE OF MISSOURI,  
Respondent,

vs.

HEATH A. WILKINS,  
Appellant.

No. 68393

ORDER

The record on appeal and the report of the trial judge having been filed in this cause pursuant to section 565.035, RSMo Supp. 1984, the matter is docketed for review on October 3, 1986. Appellant's brief is due on or before September 10, 1986. Respondent's brief is due on or before September 25, 1986. Appellant's reply brief, if any, is due on or before October 1, 1986. Oral argument is set for October 3, 1986.

The State Public Defender is requested to appoint counsel to act as amicus curiae with respect to any issue subject to review. Amicus curiae's briefs shall be filed on or before the date appellant's briefs are due. Amicus curiae will be permitted time to argue to the extent time allocated to the appellant is not used.

Day - to - Day

Andrew Jackson Higgins, Chief Justice

STATE OF MISSOURI—SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 23rd day of

August, 1986, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the

seal of said Supreme Court, Done at office in the City of Jefferson,

State aforesaid, this 23rd day of August, 1986.

Thomas F. Simon, Clerk

Deputy Clerk



# Supreme Court of Missouri

en banc

October 3, 1986

STATE OF MISSOURI,  
Respondent,

vs.

HEATH A. WILKINS,  
Appellant.

No. 68393

## REQUEST FOR MEDICAL EXAMINATION

This is an appeal from a conviction of first degree murder and sentence of death entered on a plea of guilty by appellant.

On October 3, 1986, this appeal was submitted on the record of proceedings in the trial court and the briefs and arguments of amicus curiae and of the office of the Attorney General.

Appellant appeared without counsel and in response to questions from the Court announced a waiver of his right to counsel as he did in the trial court. The question of the waiver was ordered taken with the case subject to medical examination to determine appellant's competence to waive his right of counsel on appeal.

The Court requests that the Department of Mental Health of Missouri designate S. D. Parwatikar, M. D., a psychiatrist, to examine appellant and make a report to this Court on the question of appellant's competence to waive his right to counsel. The case will be held under submission pending receipt of the report of Dr. Parwatikar.

Day - - - Day

*Andrew Jackson Higgins*  
Andrew Jackson Higgins, Chief Justice

EXHIBIT A

JOHN ASHCROFT  
GOVERNOR

KEITH SCHAFER, Esq.  
DIRECTOR  
DEPARTMENT OF MENTAL HEALTH

ROBERTS JONES, M.D.  
DIRECTOR  
DIVISION OF COMPREHENSIVE  
PSYCHIATRIC SERVICES



STATE OF MISSOURI  
DEPARTMENT OF MENTAL HEALTH  
DIVISION OF COMPREHENSIVE PSYCHIATRIC SERVICES  
MALCOLM BLISS MENTAL HEALTH CENTER  
1420 GRATTAN STREET  
ST. LOUIS, MISSOURI 63104  
(314) 241-7600

ROBERT O. BUETHER, M.S.  
SUPERINTENDENT

LARRY C. MOLES, M.S.A.  
ASSISTANT SUPERINTENDENT  
ADMINISTRATION

BUN TEE CO. JR., M.D.  
ASSISTANT SUPERINTENDENT  
MEDICAL

DEC 31 REC'D

December 29, 1986

The Honorable Andrew Higgins  
State of Missouri Supreme Court  
P.O. Box 150  
Jefferson City, Missouri 65102

RE: Heath A. Wilkins # 6839  
MB#: 064517/-  
Cause No. 68393

Your Honor:

I have completed the evaluation of Mr. Heath A. Wilkins, a 17 year old, single, Caucasian male who is currently confined at Missouri State Penitentiary in Jefferson City, Missouri, having been convicted of First Degree Murder, Armed Criminal Action, and Unlawful Use of a Weapon, Circuit Court Case Nos. CR185-490FX, CR185-491FX, and CR185-492FX in Clay County and sentenced to death on June 27, 1986.

The current evaluation was ordered by the Supreme Court of the state of Missouri to determine the competency to waive his rights to counsel.

During this evaluation, I interviewed Mr. Wilkins for three and a half hours at Missouri State Penitentiary and reviewed the following materials:

- 1) mental examination performed at Western Missouri Mental Health Center, dated December 16, 1985 by Dr. Steven Mandracchia.
- 2) psychological test report done at the Menninger Clinic in Topeka, Kansas by Dr. Melvin Berg, dated April 8, 1986.
- 3) a diagnostic interview report of Dr. William Logan, dated April 11, 1986.

EXHIBIT B

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4) an investigative report by the Board of Probation and Parole, state of Missouri, submitted by Mr. Steven Haynes, dated June 6, 1986.

5) a diagnostic report of the Classification Unit of the Department of Corrections written by Mr. Floyd George, CCW, dated July 8, 1986

6) transcript of the proceedings of the Supreme Court with appearances by Mr. Wilkins; Mr. John Morris, Assistant Attorney General; and Ms. Nancy McKerrow; and Ms. Janet Thompson, Assistant Public Defender (amicus curiae).

SUMMARY OF BACKGROUND MATERIAL:

Offense:

Mr. Wilkins, on 7/28/85, admittedly stabbed a female cashier at Linda's Liquor Store in North Bell, Kansas City. Mr. Wilkins who was a juvenile at that time made the statement in front of his mother and the Juvenile Officer, Ms. Joan Rumley, stating that he had taken a cab to North Kansas City Hospital where two of the codefendants stayed and Mr. Wilkins along with another codefendant went to Linda's Liquor to commit the crime. They watched people leave, then went inside to order a sandwich, at which time the codefendant asked to go to the bathroom. Mr. Wilkins continued indicating that he then asked for extra lettuce. The codefendant came out of the bathroom and grabbed the victim, at which time Mr. Wilkins admitted stabbing her where he thought her kidney was. He then continued stabbing her two or three times in the chest area and in the throat two or three times. Upon acquiring whether he knew they were going to kill the woman before they went to the liquor store, Mr. Wilkins reportedly answered affirmatively, indicating, "I told them there would be no witnesses."

Mr. Wilkins was subjected to competency examinations on 11/27/86 by Dr. Mandracchia; on 3/20/86 by Dr. Logan; and on 4/9/86 by Dr. Melvin Berg. Subsequently on April 16, 1986, a competency hearing was held and he was found competent to stand trial. A week later Mr. Wilkins was allowed to waive his right to counsel. On May 9, 1986 Mr. Wilkins withdrew earlier pleas and entered a plea of guilty to the charges of first degree murder, armed criminal action, and unlawful use of a weapon. During this time, Mr. Wilkins as well as the prosecuting attorneys recommended the death penalty. The court accepted the guilty plea. On June 22, 1986 following a sentencing hearing Mr. Wilkins was sentenced to death.

A amicus curiae brief was filed by Ms. McKerrow and Ms. Thompson which was heard on October 3, 1986, at which time having listened

to the arguments and Mr. Wilkins' testimony, this examination was ordered.

Summary of Mental Examination at Western Missouri Mental Health Center:

Except for the report that Mr. Wilkins had ingested LSD approximately four hours before the alleged offense and having admitted to moderately heavy recreational use of both alcohol and a variety of illicit drugs (primarily hallucinogens), Dr. Mandracchia did not find any significant information and concluded that he does not suffer from any mental disease or defect, pursuant to the provisions of Chapter 552, Revised Statutes of Missouri. He also opined that Mr. Wilkins was competent to assist his legal counsel and cooperate with the court in his own best interest.

Summary of Dr. Logan's Report:

After exhaustive review of his past history obtained from Mr. Wilkins' evaluation at Tri-County Mental Health Center, Western Missouri Mental Health Center during August and September of 1979, records from Butterfield Youth Services between the periods of 2/1/80 until 5/20/83, reports of staff members at Crittenton Center covering the period of 5/20/83 through 11/17/83, and a personal interview of five hours, Dr. Logan reported that Mr. Wilkins had an accurate understanding of the charges pending against him, potential penalties if convicted, possible pleas, the role of various officers and procedures of the court, and possession of sufficient memory and the ability to relate details of his case to his attorney, however, he stopped short of giving an opinion as to whether he was competent to proceed or not. Dr. Logan indicated in his report that although Mr. Wilkin's cognitive capacity was intact, his actions were governed more by his emotions. He emphasized that his wish to die and determination to plead guilty to speedily effect this and had resulted in his (Mr. Wilkins) feeling that his attorney was not working in his best interest. Thus, Dr. Logan stated, "In conclusion, while the patient has an adequate factual understanding of his situation and the ability to cooperate with his attorney, emotional issues may prevent him from acting in his own best interests. The weighing of these two factors, the cognitive versus emotional, is the essence of the decision before the court." Dr. Logan further opined that Mr. Wilkins suffered from a severe personality disorder characterized by enduring maladaptive patterns of perceiving, conceiving, and relating to his environment. He concluded that his diagnoses were "Conduct Disorder Undersocialized, Aggressive Type; Hallucinogens and Cannabis Abuse; Borderline and Schizotypal Personality Disorders." He also opined that although he had suffered from a mental disease at the time of the crime, he had the ability to appreciate the



nature, quality, and wrongfulness of his conduct and the ability to conform his conduct to the requirements of law.

Summary of report of Dr. Berg:

After administering WAIS-R, Animal Choice Test, TAT, and Rorschach Test, Dr. Berg indicated that the referral had occurred because his attorney had in his possession forms written by Mr. Wilkins which presented rather morbid preoccupations regarding death and that he had shown a disinterest in mounting a legal defense and had shown readiness to accept the death penalty.

Dr. Berg found Mr. Wilkins to be functioning at a Full Scale IQ of 105. On subtests, he demonstrated a disinterest or inability to sustain logical and stepwise problem solving in situations calling for careful and deliberate thoughts. There was some tendency to associate ideas on the basis of rhythm. For example, when asked to explain Marie Curie's achievement, he said, "For inventing mercury." The definition of "plagiarize" was, "The act of getting pleasure." Although he appeared to have cognitive capabilities, his responses to abstraction and integration were impulsive and reflective of an inaccurate, vague, and mildly distorted understanding of social conventions. He also used words and phrases in an odd, idiosyncratic manner, such as describing a slender individual as "demuscular" and referring to Martin Luther King as "freedom mover." After citing several examples of his responses to test situations, Dr. Berg opined that Mr. Wilkins presented a picture of Conduct Disorder, Undersocialized, Aggressive Type, a disorder manifested by acting out towards the outside world in an attempt to suppress underlying feelings of anxiety, depression, and anger. It was his opinion that these feelings interfered with his ability to think clearly, thus, giving rise to impulsive action which when combined with his anger at the outside world, which has rejected him, lead to spasms of destructive action.

Summary of Presentence Report:

Mr. Steven Haynes, after reviewing the past reports as well as talking to his mother, concluded that probation was not possible on the charges of murder, first degree; armed criminal action; and no recommendations were offered.

It should be noted that Ms. Wilkins reiterated the fact that he felt like a celebrity in jail and while growing up she did not have time for Mr. Wilkins because of her preoccupation with his older brother Jerrod. She admitted denying existence of serious problems with Heath even though they were pointed out by authorities at Butterfield and Crittenton.

Summary of Pertinent Past History:

Mr. Wilkins is the younger of two sons born to his father and mother. He was born in Little Rock, Arkansas and did not remember his father since his parents were divorced when he was approximately four years of age. He was raised in a rather poor socioeconomic environment and did have some problems in his school years. He admittedly fought with other students and organized fights with bunches of people. Mr. Wilkins reportedly had extremely chaotic upbringing during his childhood. He was physically abused by his mother, sometimes the beatings would last for two hours. Mr. Wilkins, during my interviewing, described how he and his brother would get locked in the bedroom and tape would be placed on the door. If the tape was broken then they would get punished. In spite of this, he felt that he was his mother's favorite child. As a child, he started robbing houses for knives and money and loved to set fires. Mr. Wilkins' mother worked at night and slept during the day, thus, the children were left alone at night by themselves. He claims that he was started on drugs by his uncle. Apparently he used to shoot BB guns at passing cars. Mr. Wilkins indicated that his mother's boyfriend had a quick temper and that he hated him. He also started disliking his mother, not only because she punished them, but also because she stood up for her boyfriend who was unkind towards them. He then decided to poison his mother and boyfriend by placing rat poison in Tylenol capsules. They were informed by his brother about the situation. They secretly emptied the capsules and made him eat them. He was afraid of death and attempted vomiting by placing fingers in his throat. Then he ended up getting a beating from his mother and boyfriend. At the age of ten, Mr. Wilkins was evaluated at Tri-County Mental Health Center and Western Missouri Mental Health Center. He stayed there for a period of six months. He was then sent to Butterfield Youth's Home and then to East Range, a residential facility for boys. He started using drugs quite heavily. In addition to marijuana, which he grew on his own, he also abused inhalants, specifically a substance called "rush" which was a locker deodorant and gasoline. He additionally stole LSD from other residents which admittedly caused him to have hallucinations. He also started drinking hard liquor and because of his drug and alcohol usage, he was kicked out of the eighth grade.

At Butterfield, he was very angry at the teachers because they considered him to be "dumb." He showed rather strange behavior there. When he became depressed he would dance with a net over his head. On another occasion he cut his wrist and claimed to have had frequent thoughts of suicide. Prior to going to Butterfield, he had jumped off a bridge but the car swerved before he was hit. At Butterfield, he attempted to overdose with alcohol and drugs, and another time with antipsychotic medication, Mellaril. Mr. Wilkins was placed on Mellaril because he was "too

active." He stayed at the Butterfield Youth Home for three and one half years between the ages of 10 through 13-1/2. After that, he was transferred to Crittenton Center since it was closer to his mother's residence. He stayed there only for four or five months and was then kicked out. The court gave him permission to go home on probation. At this time his mother had started seeing another boyfriend and Mr. Wilkins apparently liked him. He continued the usage of alcohol and drugs while at school, continued to break into houses stealing money, jewelry, and knives, and generally stole money to spend at the arcade. On one occasion he ran away to Southern California. He was introduced to amphetamines there and spent all his money. His mother wired a ticket for him to return home. After his return, Mr. Wilkins was charged with a stolen knife and was sent to Detention Center in Mexico, Missouri. At age 15 he was sent to the Northwest Regional Youth Services in Kansas City. There, an attempt at prescribing Thorazine (major tranquilizer) was made. After this, Mr. Wilkins was placed in a foster home. He ran away from the foster home and lived in the basement of the home of a friend who was a tree trimmer and worked with him approximately two months. At this time he opted to go to the Job Corps. Thus, the parole was not violated. He went to Clearfield, Utah, but after a week he quit and returned to Kansas City to begin living on his own. Beginning in May of 1985, he lived on the streets, frequently sleeping in a park and dating a young girl whom he had met at Northwest Regional Youth Services. He actively looked for a job using his mother's phone number. However, his mother did not relay the calls to him and thus he continued to steal merchandise, selling it to a fence for profit. He was getting more and more involved with drugs and alcohol, LSD being his favorite drug. Prior to the alleged offense, he had been kicked out of his mother's house because she felt she was being lied to and he was living in a park with his friends. Mr. Wilkins reported that during this period of time he could not sleep, eat, or even engage in sex with his girlfriend. He was using homemade LSD quite often, and on the day of the alleged crime he had done three hits of "black dragon" (LSD-like hallucinogen).

As per Dr. Logan's report, who had evaluated prior records at various facilities, indicated that Mr. Wilkins had expressed sadness and unhappiness related to not receiving attention from his mother, to staff at Tri-County Mental Health Center, and had fantasized about a possible relationship with his father which did not exist. He explained that the thefts were an attempt to gain his mother's attention and to look cool to his friends. Psychological testing at that time reflected a normal IQ, and the symptoms of anxiety, tearfulness, and depression were noted. The records also indicated that he had a tendency to deny conflicts alternately withdrawing into depression or acting out his depression in an aggressive, psychopathic manner without consideration of the consequences and a minimum of remorse. He openly talked about suicidal thoughts and felt to be at risk for

suicidal or homicidal attacks and the possibility of a thought disorder of paranoid nature was considered as a diagnostic possibility.

Records from Butterfield Youth Services in Marshall, Missouri indicated that Mr. Wilkins' natural father was committed to a mental institution in Arkansas, and there was considerable amount of physical abuse that existed in the family. Mr. Wilkins was considered to be a loner and had alienated his peers because of sarcastic, cutting remarks. He complained of stressed induced headaches and had difficulty concentrating on what he read or remembering visual or auditory materials, although a hearing evaluation revealed no problems. In the educational testing, he gave rather unusual responses. For example, when asked the reasons why we need policemen, he replied, "To get rid of people like me." He also revealed plans to blow up a large building in Kansas City saying there was too large a population, and the people would not be missed. He also made bizarre derogatory sexual comments towards women prior to visits with his mother. He had episodes of hyperventilation and passed out by fainting or chest squeezing. In the last six months of 1981, there was no family contact and he started becoming suspicious of adults and peers. On one occasion in September of 1981, he put gasoline into a toilet and set fire to it, causing an explosion. Mr. Wilkins' brother was diagnosed to be suffering from schizophrenia when he was admitted along with Mr. Wilkins in 1982 at Crittenton Center. Mr. Wilkins was often noted to be fantasizing about outer space and supernatural powers. In the fall of 1982, Dr. Chapel, the psychiatrist at Crittenton Center, recommended placement on Mellaril because of a "disoriented thinking pattern and high anxiety." In 1983, his condition started deteriorating. He was transferred to private tutoring from the public school, and he decided to try to earn his way out of the Youth Home. His final diagnoses in November of 1983 when he was discharged from Crittenton were Borderline Personality and Passive-Aggressive Personality. Psychological testing at Crittenton indicated isolated episodes of paranoid functioning. There was explicit distrust of doctors and others who pose to help him, whom he thought were interested in accomplishment of their own desires, and the treating psychologist expressed a serious concern about violent, destructive, and self-destructive action.

Summary of Interview at Missouri State Penitentiary:

Mr. Wilkins who is a rather diminutive individual with a short beard and moustache. He was handcuffed and interviewed in an open cell in the death row area. There were two officers sitting outside of the cell and I was accompanied by Ms. Penny Hooss, psychologist working at the Missouri State Penitentiary. After informing him of the purpose of my visit which he clearly understood, Mr. Wilkins decided to talk freely, however, repeatedly looked behind him at the officers as if to see if they



were hearing or watching him. He repeatedly tried to roll his own cigarettes to smoke, however, threw the tobacco and the paper on the floor, having failed in his attempts. On two occasions, he did borrow cigarettes from the guards. In spite of his suspiciousness Mr. Wilkins was quite cooperative during the interview and imparted information quite readily. Mr. Wilkins' interview was geared towards eliciting information to determine his ability to understand his Constitutional Rights and his reasons for waiving his right to counsel, in addition to assess his mental status in order to determine his ability to receive, retain, and recall information.

In spite of rather difficult circumstances, Mr. Wilkins talked rather freely and was functioning at the Bright Normal range of intelligence. This intelligence appeared to be consistent with his previous testing done by Dr. Berg.

Mr. Wilkins' version of the offense was basically similar to that he had imparted to other psychiatrists and police with one exception, that he stated that he did not plan to hurt anybody prior to the alleged offense, but merely had planned to rob in order to get money for drugs. Although he did admit to the statement he had made to his codefendants and the police that he did not want any witnesses. Mr. Wilkins was able to give extensive details of his past history, including his tenure at Butterfield and Crittenton, as well as his treatment at Western Missouri Mental Health Center and Tri-County Mental Health Center. He recalled that his experiences there were rather horrifying. Mr. Wilkins dwelled rather extensively at his experiences at being put in straight jacket and being "pumped with Thorazine," causing him to feel like a "zombie." He also talked about being sexually abused at one of the Detention Centers in a tangential way while describing why he did not opt to be in the general population of Missouri State Penitentiary. Mr. Wilkins talked about his difficult times at home, including his anger towards his mother and stepfather (mother's boyfriend) who had been physically abusive towards him and his brother and readily admitted that he had had thoughts of killing them by putting rat poison "cyanide or arsenic" in Tylenol capsules and how he became horrified and scared to death when they found out about it, emptied the capsules, and made him swallow them. He compared such experiences at home with those at Butterfield, Crittenton, and the mental health centers, and how these experiences had led him to live on the streets and use drugs. His descriptions of all of these experiences as well as his feelings did not reveal any delusions (fixed ideas unshakable by logical reasoning). Mr. Wilkins denied any hallucinations (perceptions of hearing, seeing, feeling, smelling, or tasting without perceptual stimulation).

In order to understand his reasoning for waiving the counsel during the trial, Mr. Wilkins, in response to the question as to why he "fired his attorney," stated as follows: "I did not want

an attorney because he did not want to ask for the death penalty. I felt that no attorney would want me to do that, also they would argue that anybody that wants to die is not making the right decision. They feel that as long as you have life you have a chance. When I pleaded guilty, I didn't have an attorney, I told the judge I deserved the death penalty since I had committed a cold-blooded murder." When asked whether he was capable of presenting both aggravating and mitigating circumstances to arrive at the opinion that he should get the death penalty, Mr. Wilkins answered, "I don't know of any mitigating circumstances. They were saying that my background history was poor, but I don't think that anybody should drag other people into this." Mr. Wilkins admitted that he did not want his past history to be "dragged around" in the court. He continued that he had told Dr. Logan a lot of things but many things were then twisted around, and he felt that much of the information would not have helped him anyway. He stated for example, he was reported to have shot at passing cars, etc., "I didn't have any gun to shoot at passing cars, I had a BB gun. I wouldn't be that stupid to kill people like that." Mr. Wilkins further added that he did not want his mother's physical abuse of him to be brought out because he likes his mother and has developed a better relationship since his incarceration. When inquired as to why after pleading guilty he did not let the judge make up his mind about giving him either 50 years without parole or the death sentence since it was up to the judge to decide sentencing based on the information available to him, Mr. Wilkins stated, "I would rather die than spend the rest of my life in prison. I thought I would get better treatment if I asked for the death penalty because I would be in a special population. Have you seen what they can do, I have been told a lots of horror stories." When asked why he did not choose for a jury trial since it may have resulted in a lesser sentence, he stated, "What's the difference between 25 years and 50 years, you still have to spend your time in the general population, getting raped or stuck in the solitary and then they pump Thorazine and all kinds of stuff into you. People on the outside don't know how it is." Mr. Wilkins indicated that although he had not been in an adult prison, he was equating his experiences at Butterfield, Crittenton, and other mental hospitals to be equal to what he would be going through in the general population or possibly worse than that. In emphasizing this points, he indicated that he was placed in SMU (Social Maladjustment Unit), where he was placed in a solitary cell without any interaction with others and was stripped of all of his possessions as well as clothing. In his mind, this experience at the SMU was equivalent to what he had experienced on occasions at the other facilities which caused him to run away from them. He indicated that that's the kind of life he would have if he were to be in general population during 25 or 50 years, and thus, had opted for the death penalty. Mr. Wilkins was then questioned as to why he underwent psychiatric examinations if he had always wanted to plead guilty and opted for a death penalty. He indicated that he wanted to go through the



psychiatric examinations so that they could consider him competent and then he could plead guilty. Mr. Wilkins' reasoning as to why he told Dr. Logan about his desire to opt for a death penalty if he wanted to be considered competent, he stated he wanted Dr. Logan to know everything about himself because he wanted him to know why it would be better for him to die. When inquired as to why Mr. Wilkins wanted to discharge his attorney when he had indeed done his part to prove that he is not "insane" and that he was competent to stand trial, Mr. Wilkins stated, "My attorney would not go for a death penalty." When asked as to why he has not sought some legal counsel while he is staying at the death row, Mr. Wilkins stated, "I want the death penalty so why should I ask for an attorney to appeal my case. There is nothing to appeal." Later on he stated, "I want to shorten all the legal steps as much as possible." When asked whether he would be satisfied if all the legal appeals were exhausted and then he could be put to death the next day, Mr. Wilkins replied, "No, I'm not prepared for that yet." He also stated that he is not looking for suicide because, "If I wanted to just die and kill myself I would have done that since I have had many opportunities to do so in jail or at prison. When asked why then he would not be prepared to die the very next day, Mr. Wilkins replied, "Nobody wants to die and I have to prepare myself for it." At this point of questioning Mr. Wilkins started realizing that he is rather ambivalent about the death penalty and immediately started stating, "Are you going to file this report without any emotional bias or you're just going to say I'm incompetent. I'll be very disappointed with that."

Further inquiring as to why he did not want his background information presented as mitigating factors and why he now claims that he did not use any drugs prior to the alleged crime when he had already made the statements to both Dr. Logan and Dr. Mandracchia that he indeed was using LSD prior to the alleged crime and that his actions were described by him as "stupid" and that he was "consumed," in relation to this, and that he made a statement to the doctors examining him that he realized his actions did not make any sense, why he is denying those claims and statements now stating that he was not taking any drugs prior to the alleged crime. He hesitated, but then added that those can't be considered mitigating circumstances. Mr. Wilkins spontaneously stated, "Have you ever seen anybody put to death yet. There are lots of people sitting on the death row but nobody gets killed. They all get special treatment and you can go on for a long time before you can die, and I'm going to get that time."

Mr. Wilkins' orientation was appropriate. He was able to give the time, date, year, etc., as well as his demographic information appropriately. He was able to recollect past events in a rather chronological order without any difficulty in recollection. He was able to abstract from proverb, was somewhat idiosyncratic, he interpret the proverb 'Don't cry over spilt milk' as "You have to be responsible for what you do."

In order to determine what are the alternatives he could have or he has thought of in his particular legal situation, Mr. Wilkins was asked questions related to the understanding of his legal options. He indicated that he understood that if he were to be considered incompetent to waive his Constitutional Rights, he will have to be forcibly accept a legal counsel. He stated that he is afraid that if he were to be considered mentally disordered by a psychiatrist he may have to go back to a mental institutions which he detested the most. He also understood that if he is reconsidered for 50 years without parole because he has already pleaded guilty to first degree murder, he would be moving into general population which again is not a desirable option for him, primarily because of his feeling that he will be mistreated both by the staff and the inmates. Mr. Wilkins understood that there is a remote possibility of being pardoned by the Governor or there may be some technical problems in the presentation of his case which might result in overturning the decision or he might get a rehearing. He stated that in spite of that he does not see how he could get out of the prison system and that instead of going through his life in the general population, he would rather stay on the death row and take the death penalty.

#### DIAGNOSES:

Based on Mr. Wilkins' history and his age, he fits the diagnosis of Conduct Disorder, Undersocialized-Aggressive Type. The behavior that was taken into consideration for this diagnosis is evidenced by aggressive activity against persons and property, thefts outside of the home, having any peer or group friendships or relationships which lasted only over a very short period of time, evidence that he has shown remorse and guilt about certain actions which were considered dyssocial even when he was not incarcerated or was in any difficulty, his current situation which resulted as a collective action of four people, however, his refusal to blame them and take all of the responsibility upon himself and having had this behavioral difficulties for a number of years resulting in institutionalization. Mr. Wilkins also has an extensive history of alcohol and drug abuse having used gasoline, glue, pot, uppers and downers since the age of six on a rather regular basis and having used LSD quite frequently. These diagnoses are the primary diagnoses in his case and can be formally placed on Axis I of the Diagnostic Coding suggested by Diagnostic and Statistical Manual of Psychiatric Association.

The diagnosis on Axis II or disorders of personality and underlying difficulties in responses to stressful situations in an individual can be applicable in Mr. Wilkins' case as Dr. Logan had pointed out and Mr. Wilkins certainly meets the criteria for such diagnosis. His diagnosis under this axis would be that of Borderline Personality Disorder. A person with such disorder has difficulty in establishing a pattern of predictable response to

stressful situations vacillating between aggression towards others or self-destructive activity.

Other than this, Mr. Wilkins also has been seen to be exhibiting bizarre behavior, paranoid ideation, and idiosyncratic thinking dating back to 1982 when he was at Crittenton Center for drug and alcohol addiction and was diagnosed as suffering from schizophrenia. This diagnosis was not made at this time because of lack of further evidence and the possibility of many of his symptoms may be related to alcohol and drug usage.

#### DISCUSSION:

Having no clear-cut psychiatric test to determine competency to waive Constitutional Rights and legal counsel, it was felt necessary that one should define mental disease, defect, and disorder, ability to reason, and one's ability to act upon these reasons in a rational manner in order to arrive at an opinion whether Mr. Wilkins meets the appropriate criteria from a psychiatric viewpoint to waive his rights.

Mental disease and defect are legal terms for which there is very little definition available from a psychiatric viewpoint, however, it is generally accepted that mental disease is a term applied to conditions which present themselves as an abnormality of thinking or mood such as hallucinations, delusions, manic behavior, and depression, as well as pervasive anxiety which is manifested by paralysis of effective functioning in reality which is complained by an individual. Mental defect is a condition which causes a person to have difficulty in either receiving, retaining, or recalling information and applying it in reality situations. The latter is generally manifested by people who have mental retardation or organic brain deficit.

Mental disorders are defined as clinically significant behavioral or psychological syndromes or patterns that occur in an individual manifested either by a painful symptom or impairment in one or more important areas of functioning. Under this concept, Mr. Wilkins' condition appears to be related to a mental disorder rather than a defect or disease. Reviewing past history as well as records, it appears that Mr. Wilkins for most of the time has had conscious control over his behavior. However, the reasoning behind his conscious behavior appears to be based on lack of rationality and disregard for long-term consequences. For example, when he had tried to poison his mother and her boyfriend he seems to be quite aware of the wrongfulness of such action. However, in his mind his reasoning was "If they don't understand you or are abusing you then it is alright to kill them." Such rationalization discards any consequences of such action and jeopardizing one's future growth and freedom in view of immediate elimination of the problem at hand. It could be argued that similar thinking is present in antisocial persons, however, Mr.

Wilkins not only had not developed a full personality and was a child when such reasoning was evidenced. An antisocial individual is a physically mature person who does not have to depend on others for nurturance unlike Heath. Similar reasoning is evident in the alleged crime. Mr. Wilkins asking for the death penalty also seems to be based on such faulty reasoning. He starts by the premise that he deserves the death penalty because he had committed a cold-blooded murder. However, immediately adds that nobody on the death row has died yet, so not only that he will live but also will get the special privilege of being on the death row as opposed to the imagined torture and humiliation in the general population. It should be noted that Mr. Wilkins' description of what happens or what could happen in the general population of Missouri State Penitentiary is based on his experience at juvenile homes, foster homes, and mental health centers and not based on adult experience at these facilities. Awaiting his placement in death row, he was in the SMU (Social Maladjustment Unit) where he subjectively felt being treated worse than at the death row. He equates this to the treatment he would receive in the general population. During the interview, when it was repeatedly pointed out to him that there were several mitigating factors in his case he chose not to elaborate on them and repeatedly made the same statement over and over that he deserves the death penalty because he had committed a cold-blooded murder. Mr. Wilkins not wanting his mother to be brought into the court and to be portrayed as an unfit mother also seems to be based on the fact that he does not want to jeopardize his relationship with his mother which seems to have improved after his conviction. He tends to completely ignore the fact that he was living in the Penguin Park for several days having no place to live because of his mother's total abandonment in spite of his being a juvenile. Mr. Wilkins, during the current interview, denies any drug usage prior to the alleged crime, although he had admitted such to Dr. Logan on five occasions, again indicating that he vacillates in his choice of means to achieve the goal of wanting to be punished by death. If he had adequate and consistent reasoning he probably would have made the statement to Dr. Logan that he had premeditated the murder and that he did not have any drugs or alcohol in his system before he went there to the scene of the crime. His current denial and the statement that Dr. Logan had misunderstood many of his verbalizations appears to be an impulsive decision in order to expedite his execution again whether he really intends that is not clear because when a direct question is posed if he would like to be executed tomorrow if all the legal processes could be terminated today, he answers negatively, claiming that he is not ready to die yet. Thus, the reasoning for waiving his Constitutional Rights is based on his tendency to use limited pieces of information to justify his emotional bias. He tends not only to convict himself but also pass a judgment as to how he should be punished. This tendency was evident when asked by the trial judge for a recommendation.



Mr. Wilkins joined the prosecuting attorney in recommending a death penalty.

Mr. Wilkins' psychological test done by Dr. Berg also reveals his disinterest or inability to sustain logical and stepwise problem solving in situations calling for careful and deliberate thought.

His testimony at the time of his hearing on October 3, 1986 at the Supreme Court when summoned by Chief Justice Higgins, Mr. Wilkins instead of addressing the issues raised by the attorneys for amicus curiae and the Assistant Attorney General made rather curious comment which sounded almost like he was presenting the mitigating circumstances in his case, however, ended up stating that he had made a rational decision to waive the counsel. He stated, "Your Honor, there were several comments made into the question of my competency at the time of the crime, and also my competency at my trials and my hearings. I would like to, for the court to be aware of, as was stated by the ladies and gentlemen over there, that I had a .... I don't know the exact words to put it in, a background of mental and psychological problems and that I've been in some previous institutions. And I would just like for the court to be aware before the crime, I was in an institution known as Northwest Regional Youth Services, run by the Division of Family Services of the state of Missouri. That is an intense psychological and . . . intense psychological program to help children of the ages of 14 to 18 and to decide if they need any further mental evaluations . . . any help to help them proceed into society and to become decent citizens. I was in that program for I think as I can recall for over 9 months, and I completed that program and I was released on a . . . into the custody of my foster parents that I was assigned to, and I had, I guess, I would put it into my language, a clean bill of sale. I completed a highly intense evaluation and program set up by the state of Missouri specifically for situations and problem children like me, and I completed the program. And I would, as was mentioned by one of you gentlemen a little earlier, about Mandracchia, when he did his mental evaluation of me at the time, he did not know that I had intentions of seeking the death penalty. And then when Dr. Logan and his associates did their evaluation later in time, they did know that I was seeking the death penalty. And that there should give a very clear, as . . . let you see both sides of the, how should I put this . . . to let you understand that something wasn't spontaneous act, because at the time Mandracchia, the first mental evaluation was commenced, I had already made that decision and consulted with my attorney, Mr. Duchardt, who was at that time my attorney, about what I wanted to do. And then I asked him, don't . . . let's not . . . let's keep this between us, and so we went on with the evaluations. And I think that there has a lot to do with Dr. Logan's opinion that he would rather leave it to wiser souls than himself, which I respect.

Also there came up a question it was never questioned that . . . why I dismissed my public defender, Mr. Duchardt, why I dismissed him. And it was also stated that I said, 'Well if the attorney could help me get the death penalty.' At that time Mr. Duchardt was having some turmoil within himself because I was asking him to do something that was against his moral and ethical judgment and his values. And I felt it upon myself to make the decision that when an attorney is faced with those obstacles, that I would proceed in the direction in getting the goals that I wanted without the assistance of an attorney. And that is why, that is why I did that. That's all I want to say."

Having discussed the difficulty in Mr. Wilkins' reasoning capabilities, I would like to make a brief comment as to his cognitive capabilities. Without laboring into the findings of previous psychological tests I would have to concur that Mr. Wilkins' ability to perceive, retain, and recall information is adequate for the purposes of courtroom situations and if he wanted to he could impart the same information to his legal counsel. Thus, his determination that he was competent to proceed was appropriate. However, currently we are at a point where we have to determine whether Mr. Wilkins is capable of acting in his own behalf. This is where the question of reasoning ability and acting out impulsively without regard for long-term consequences etc. becomes a point of discussion. Both Dr. Logan and Dr. Berg had discussed this issue in their finding at length and behavioral observations of Mr. Wilkins' behavior at the institutions he was housed has been quite well documented in the records. These behavioral observations date back to 1980 and are congruent with the psychological test findings of Dr. Berg. These include his suicidal attempts, his aggressive behaviors and intense anger towards females. Another example of Mr. Wilkins acting out in a self-destructive manner is the fact that although he understands that he had committed a crime for which the penalty would be either 50 years in prison without parole or death penalty, he chooses the death penalty for unclear reasons. On one hand he claims to waive his right to counsel to expedite the process but on the other hand he does not want to be executed tomorrow, that being too soon. A person with a fully competent mind will not hesitate to take the quickest route if he has already determined the end. This clearly shows his impulsive and emotional decision making tendency based on faulty or inadequate information. He also fails to understand that the ultimate fact finding and judgment is the function of the jury or the judge and that he must impart truth but facts regarding his development, his reasoning, his understanding, and his feelings before the crime, at the time of the crime, and after the crime in order that appropriate punishment could be meted out. He also seemed to be rather concrete on his understanding of the degree of severity of his crime and his position seems to be that either he is free on the streets or he is put to death rather than "suffering" for a



long time in the prison population. Even if Mr. Wilkins was to plead guilty to the charges he should present an accurate picture of the facts as they occurred including his prior history of psychiatric problems in order for the judge or the jury to make an appropriate decision. It appears that such rational thinking is not present with Mr. Wilkins, partly because of his age, partly because of his lack of growth in an emotionally secure environment and lack of parental supervision which led to his subsequent inadequacy to establish himself as a person in his own right. Mr. Wilkins' background also includes a mental illness in his natural father as well as his brother which presents a strong possibility of genetic predisposition to mental disorder which may have contributed to his distorted reasoning.

SUMMARY AND RECOMMENDATIONS:

1. Mr. Wilkins suffers from a mental disorder which cannot be specifically considered a mental defect or disease within the meaning of Chapter 552.010, Revised Statutes of Missouri. However, this disorder does effect his rational reasoning and impairs his behavior.
2. Because of his mental disorder he suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his Constitutional Rights and represent himself in front of the court.
3. Because of his unimpaired ability to receive, retain, and recall information, he is competent to assist his attorney if one is appointed, although on occasions he may choose not to cooperate with him and evidentiary facts may have to be put forth by testimony of others.

Thanking you.

Respectfully submitted,

*S. D. Parwatikar*  
S. D. Parwatikar, M.D.  
Forensic Psychiatrist

SDP/cmr



**Supreme Court of Missouri**

en banc

January 26, 1987

STATE OF MISSOURI,

Respondent,

vs.

HEATH A. WILKINS,

Appellant.

No. 68393

ORDER

The motion of Amicus Curiae to reverse and remand judgment and sentence is overruled.

On Court's own motion, the submission is set aside and the State Public Defender is appointed counsel to represent Appellant, Heath A. Wilkins in this appeal.

Day - to - Day

*Andrew Jackson Higgins*  
ANDREW JACKSON HIGGINS  
Chief Justice

STATE OF MISSOURI—SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 26th day of January 1987, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Supreme Court Done at office in the City of Jefferson, State aforesaid this 26th day of January 1987.

*Susan Bodemer*  
Clerk  
D.C. 41

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN FINDING APPELLANT COMPETENT TO PROCEED AND IN FAILING TO MAKE A SEPARATE FINDING AS TO APPELLANT'S COMPETENCE TO WAIVE HIS CONSTITUTIONAL RIGHT TO COUNSEL AND TO A JURY TRIAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ALLOW THE TRIAL COURT TO MAKE EITHER DETERMINATION IN THAT THE FINDING OF COMPETENCE WAS BASED ON THE TESTIMONY OF TWO DOCTORS, NEITHER OF WHOM HAD SPENT AN ADEQUATE AMOUNT OF TIME WITH APPELLANT AND WHOSE OPINIONS AS TO APPELLANT'S COMPETENCE DIFFERED IN SIGNIFICANT RESPECTS LEAVING SERIOUS QUESTIONS CONCERNING APPELLANT'S COMPETENCE UNRESOLVED. IN ADDITION, APPELLANT'S COMPETENCE TO WAIVE CONSTITUTIONAL RIGHTS WAS NOT AN ISSUE AT THE COMPETENCY HEARING, AND THEREFORE, THE COURT NEVER MADE A SPECIFIC FINDING ON THAT ISSUE.

Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966);  
Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981);  
Rees v. Payton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966);  
Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975);  
Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960);  
McCarthy v. State, 502 S.W.2d 397 (Mo. App., St.L.D. 1973);  
Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966);  
Seiling v. Eymann, 478 F.2d 211 (9th Cir. 1973);  
Schoeller v. Dunbar, 423 F.2d 1183 (9th Cir.) cert. denied, 400 U.S. 834 (1970);  
Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);  
Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980);  
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978);

State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985);  
Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981);  
Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979);  
U.S. Const. amend V, XIV;  
Article I, Section 10, Mo. Const. (1945);  
Chapter 552, RSMo. 1986;  
Section 565.030, RSMo 1986; and  
Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S.Cal.L.Rev. 1143 (1980).

II.

THE TRIAL COURT ERRED IN FAILING TO CONSIDER, ON THE RECORD, ANY EVIDENCE IN MITIGATION OF PUNISHMENT AT THE SENTENCING HEARING AND IN THEN SENTENCING APPELLANT TO DEATH IN THAT BY SO DOING IT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE PUBLIC POLICY AGAINST STATE-AIDED SUICIDE BECAUSE ITS ACTION CONTRAVENED THE STATUTORY PROVISIONS MANDATING THAT THE COURT CONSIDER ANY MITIGATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE; IT EFFECTIVELY PRECLUDES THIS COURT FROM REVIEWING THE PROPORTIONALITY OF THE SENTENCE, AND FURTHERS APPELLANT'S SUICIDAL GOAL OF RECEIVING THE DEATH PENALTY. IN THE ALTERNATIVE, THE TRIAL COURT ALSO PLAINLY ERRED IN, BY IMPOSING THE DEATH PENALTY, DETERMINING THAT THE TWO AGGRAVATING CIRCUMSTANCES OUTWEIGH THE THREE MITIGATING CIRCUMSTANCES BECAUSE, QUANTITATIVELY, THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES AND THE DEATH PENALTY SHOULD NOT HAVE BEEN IMPOSED AND ERRED IN FINDING THAT THE MURDER WAS OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED TORTURE OR DEPRIVITY OF MIND BECAUSE THAT AGGRAVATING FACTOR VIOLATES APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THE STATUTORY LANGUAGE IS AMBIGUOUS AND PROVIDES VIRTUALLY NO GUIDANCE TO THE SENTENCING AUTHORITY.

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed.2d 1337 (1949);  
Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959);

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978,  
 49 L.Ed.2d 944 (1976);  
Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51  
 L.Ed.2d 393 (1977);  
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57  
 L.Ed.2d 973 (1978);  
State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984), cert.  
denied, 469 U.S. 873 (1984);  
People v. Deere, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal.  
 Rptr. 13 (en banc 1985);  
Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174  
 (1978);  
Massie v. Sumner, 624 F.2d 72 (9th Cir. 1980);  
Godfrey v. Georgia, 466 U.S. 420 (1980);  
Holtan v. Black, \_\_\_ F.Supp. \_\_\_, 40 Crim.L. 2174 (D.  
 Neb. 1986) (No. CV84-L-393, 11/5/86);  
 G. Goodpaster, The Trial for Life: Effective  
Assistance of Counsel in Death Penalty Cases, 58  
 N.Y.U.L. Rev. 299 (1983);  
 U.S. Const., amends. VIII and XIV;  
 Rule 29.12;  
 Section 565.032, RSMo Cum. Supp. 1984;  
 Section 565.035, RSMo Cum. Supp. 1984);  
 MAI-CR2d 15.44;  
 Cal. Const. Art. VI, Section 11; and  
 Cal. Pen. Code Section 1239, subdivision (b).

### III.

THE COURT SHOULD SET ASIDE APPELLANT'S DEATH SENTENCE  
 BECAUSE IT IS EXCESSIVE AND DISPROPORTIONATE TO THE  
 PUNISHMENT IMPOSED IN SIMILAR CASES AND IS THEREBY IN  
 VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE  
 UNITED STATES CONSTITUTION IN THAT:

A) THE FACTS OF APPELLANT'S CASE WERE LESS  
 EGREGIOUS THAN IN THE CAPITAL MURDER CASES IN WHICH THE  
 DEFENDANT WAS GIVEN A LIFE SENTENCE;

B) APPELLANT WAS SHOWN TO HAVE COMMITTED THE  
 MURDER UNDER EXTREME EMOTIONAL OR MENTAL DISTRESS DUE  
 TO HAVING BEEN UNDER THE INFLUENCE OF LSD AND ALCOHOL  
 WHEN COMMITTING THE MURDER, AND TO HAVING SUFFERED FROM  
 A LONG-TERM HISTORY OF SUBSTANTIAL MENTAL ILLNESS; AND

C) APPELLANT WAS ONLY SIXTEEN YEARS OF AGE AT THE  
 TIME HE COMMITTED THE MURDER.

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71  
 L.Ed.2d 1 (1982);  
State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984), cert.  
denied, 469 U.S. 873 (1984);  
State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982), cert.  
denied, 459 U.S. 1137 (1983);  
State v. Boyd, 706 S.W.2d 461 (Mo. App., E.D. 1986);  
State v. Emmitt F. Dunn, Ct. App., appeal pending;  
State v. Walter Lee Harvey, Jr., Ct. App., appeal  
 pending;  
State v. Verna Mae Jones, Ct. App., appeal pending;  
State v. Scott, 651 S.W.2d 199 (Mo. App., W.D. 1983);  
State v. Weatherspoon, 716 S.W.2d 379 (Mo. App., W.D.  
 1986);  
State v. Williams, 678 S.W.2d 345 (Mo. App., E.D.  
 1984);  
State v. William Wirth, 715 S.W.2d 4 (Mo. App., W.D.  
 1986);  
State v. Battle, 661 S.W.2d 487 (Mo. banc 1983), cert.  
denied, 466 U.S. 993 (1984);



State v. Boliek, 706 S.W.2d 847 (Mo. banc 1986);  
State v. Gilmore, 681 S.W.2d 934 (Mo. banc 1984), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2906;  
State v. Smith, 649 S.W.2d 417 (Mo. banc 1983), cert.  
 denied, 464 U.S. 908 (1983);  
State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), cert.  
 denied, 459 U.S. 1188 (1983);  
 G.R. Strafer, Volunteering for Execution: Competency,  
 Voluntariness and Propriety of Third Party  
 Intervention, 74 J. of Crim. Law & Criminology 860  
 (1983);  
 Twentieth Century Fund Task Force on Sentencing Policy  
 Toward Young Offenders, Confronting Youth Crime 7  
 (1978);  
 Rest, Davison & Robbins, Age Trends in Judging Moral  
 Issues, 49 Child Development 263 (1978);  
 Kohlberg, Development of Moral Character and Moral  
 Ideology, in Hoffman & Hoffman, Review of Child  
 Development Research, 404-405 (1964);  
 U.S. Const., amends. VIII and XIV;  
 Section 565.032, RSMo Cum. Supp. 1984; and  
 Section 565.035, RSMo Cum. Supp. 1984.

#### CITATIONS TO APPENDIX A LIFE SENTENCE CASES

State v. George Allen Jr., 684 S.W.2d 417 (Mo. App.,  
 E.D. 1984);  
State v. Robert Allen, 710 S.W.2d 912 (Mo. App., W.D.  
 1986);  
State v. Shirley Allen, 714 S.W.2d 195 (Mo. App., S.D.  
 1986);  
State v. Armbruster, 641 S.W.2d 763 (Mo. 1982);  
State v. Avers, appeal pending;  
State v. Barr, 720 S.W.2d 1 (Mo. App., W.D. 1986);  
State v. Bashe, 657 S.W.2d 321 (Mo. App., S.D. 1983);  
State v. Baskerville, 616 S.W.2d 839 (Mo. 1981);  
State v. Beck, 687 S.W.2d 155 (Mo. banc 1985), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2245 (1986);  
State v. Betts, 642 S.W.2d 604 (Mo. 1982);  
State v. Betts, 646 S.W.2d 94 (Mo. banc 1983);  
State v. Borden, 605 S.W.2d 88 (Mo. banc 1980);  
State v. Bostic, 625 S.W.2d 158 (Mo. 1981);  
State v. Bounds, 716 S.W.2d 458 (Mo. App., E.D. 1986);  
State v. Alfred Boyd, 664 S.W.2d 555 (Mo. App., W.D.  
 1983);  
State v. Stanley Boyd, 706 S.W.2d 461 (Mo. App., E.D.  
 1986);  
State v. John W. Brown, No appeal filed;  
State v. Mark Anthony Brown, 665 S.W.2d 945 (Mo. App.  
 1984);  
State v. Bryant, 705 S.W.2d 559 (Mo. App., E.D. 1986);  
State v. Burke, 684 S.W.2d 871 (Mo. App., E.D. 1984);  
State v. Burton, 710 S.W.2d 306 (Mo. App., E.D. 1986);

State v. Canterbury, 708 S.W.2d 662 (Mo. banc 1986);  
State v. Jason C. Carr, 687 S.W.2d 606 (Mo. App., S.D.  
 1985);  
State v. Rodney Carr, 708 S.W.2d 313 (Mo. App., SD.  
 1986);  
State v. Carter, 674 S.W.2d 655 (Mo. App., E.D. 1984);  
State v. Cason, 596 S.W.2d 436 (Mo. 1980), cert.  
 denied, 449 U.S. 982 (1980);  
State v. Gene A. Clark, 671 S.W.2d 1 (Mo. App., E.D.  
 1983);  
State v. Raphael Clark, 711 S.W.2d 928 (Mo. App., E.D.  
 1986);  
State v. Clemmons, 682 S.W.2d 843 (Mo. App., E.D.  
 1984);  
State v. Clevenger, appeal pending;  
State v. Coleman, 660 S.W.2d 201 (Mo. App., W.D. 1983);  
State v. Cranmer, 699 S.W.2d 88 (Mo. App., W.D. 1985);  
State v. Crespo, 664 S.W.2d 548 (Mo. App., E.D. 1983);  
State v. Davis, 653 S.W.2d 167 (Mo. banc 1983);  
State v. Dennis, 696 S.W.2d 843 (Mo. App., W.D. 1985);  
State v. Dickson, 691 S.W.2d 334 (Mo. App., E.D. 1985);  
State v. Downs, 593 S.W.2d 535 (Mo. 1980);  
State v. Dunn, appeal pending;  
State v. Edwards, 637 S.W.2d 27 (Mo. banc 1982);  
State v. Eggers, 675 S.W.2d 923 (Mo. App., E.D. 1984);  
State v. Emerson, 623 S.W.2d 252 (Mo. 1981);  
State v. Englemen, 634 S.W.2d 466 (Mo. 1982);  
State v. Fields, 668 S.W.2d 257 (Mo. App., S.D. 1984);  
State v. Follins, 672 S.W.2d 167 (Mo. App., E.D. 1984);  
State v. Michael Ford, 585 S.W.2d 472 (Mo. banc 1979);  
State v. Robert Ford, 639 S.W.2d 573 (Mo. 1982);  
State v. Franco, 625 S.W.2d 596 (Mo. 1981);  
State v. Fuhr, 626 S.W.2d 379 (Mo. 1982);  
State v. Fuhr, 660 S.W.2d 443 (Mo. App., W.D. 1983);  
State v. Gardner, 618 S.W.2d 40 (Mo. 1981);  
State v. Greathouse, 627 S.W.2d 592 (Mo. 1982);  
State v. Griffin, 692 S.W.2d 314 (Mo. App., E.D. 1985);  
State v. Groves, 646 S.W.2d 82 (Mo. banc 1983);  
State v. James Hall, 612 S.W.2d 782 (Mo. 1981);  
State v. Jesse Hall, 716 S.W.2d 392 (Mo. App., E.D.  
 1986);  
State v. Hankins, 642 S.W.2d 606 (Mo. 1982);  
State v. Harper, appeal pending;  
State v. Harvey, appeal pending;  
State v. Hatcher, appeal pending;  
State v. Hemme, 709 S.W.2d 909 (Mo. App., W.D. 1986);  
State v. Hemphill, 699 S.W.2d 83 (Mo. App., E.D. 1985);  
State v. Hemphill, 721 S.W.2d 86 (Mo. App., E.D. 1986);  
State v. Henderson, 666 S.W.2d 882 (Mo. App.,  
 S.D. 1984);  
State v. Holmes, 609 S.W.2d 132 (Mo. banc 1980);  
State v. Huggins, 612 S.W.2d 769 (Mo. 1981);  
State v. Hughes, appeal pending;  
State v. Hurt, 668 S.W.2d 206 (Mo. App., S.D. 1984);

State v. Ingram, 607 S.W.2d 438 (Mo. 1981);  
State v. Jensen, 621 S.W.2d 263 (Mo. 1981);  
State v. Jimmerson, 660 S.W.2d 475 (Mo. App., S.D. 1983);  
State v. Cornelius Johnson, 606 S.W.2d 624 (Mo. banc 1980);  
State v. Cornelius Johnson, Supreme Court No. 64402;  
State v. Ivory Johnson, 672 S.W.2d 160 (Mo. App., E.D. 1984);  
State v. Craig L. Jones, appeal pending;  
State v. Verna Mae Jones, appeal pending;  
State v. Kennedy, appeal pending;  
State v. Kennedy, (Mo. App., S.D. No. 13949), appeal pending;  
State v. Kinnard, 671 S.W.2d 336 (Mo. App., E.D. 1984);  
State v. Knight, no appeal filed;  
State v. Lawrence, 700 S.W.2d 111 (Mo. App., E.D. 1985), cert. denied, \_\_\_ U.S. \_\_\_ 106 S.Ct. 1951 (1986);  
State v. Laws, 668 S.W.2d 234 (Mo. App., E.D. 1984);  
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State v. Laws, 699 S.W.2d 102 (Mo. App., S.D. 1985);  
State v. Lipari, Supreme Court No. 62085, appeal dismissed pursuant to plea bargain;  
State v. Loggins, 698 S.W.2d 915 (Mo. App., E.D. 1986);  
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State v. Lute, 608 S.W.2d 381 (Mo. banc 1980);  
State v. Lute, 641 S.W.2d 80 (Mo. banc 1982);  
State v. Malady, 669 S.W.2d 52 (Mo. App., E.D. 1984);  
State v. Helen Martin, 666 S.W.2d 895 (Mo. App., E.D. 1984);  
State v. Robert Martin, 651 S.W.2d 645 (Mo. App., S.D. 1983);  
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State v. Miller, 682 S.W.2d 838 (Mo. App., E.D. 1984);  
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State v. Murphy, 693 S.W.2d 255 (Mo. App., W.D. 1985);  
State v. Neal, 649 S.W.2d 261 (Mo. App., S.D. 1983);  
State v. Noel, appeal pending;  
State v. Patterson, 618 S.W.2d 663 (Mo. banc 1981);  
State v. Potter, 657 S.W.2d 694 (Mo. App. W.D. 1983);  
State v. Brewitt, 714 S.W.2d 544 (Mo. App., W.D. 1986);  
State v. Price, 719 S.W.2d 801 (Mo. App., E.D. 1986);  
State v. Randolph, 698 S.W.2d 535 (Mo. App., E.D. 1985);  
State v. Randolph, appeal pending;

State v. Reasonover, 714 S.W.2d 706 (Mo. App., E.D. 1986);  
State v. Reynolds, 608 S.W.2d 422 (Mo. 1980);  
State v. Rickey, 658 S.W.2d 951 (Mo. App., S.D. 1983);  
State v. Robinson, 641 S.W.2d 243 (Mo. banc 1982);  
State v. Rodden, 713 S.W.2d 279 (Mo. App., S.D. 1986);  
State v. Royal, 610 S.W.2d 946 (Mo. banc 1981);  
State v. Salkil, 649 S.W.2d 509 (Mo. App., S.D. 1983), cert. denied, 464 U.S. 1010 (1983);  
State v. Sanders, 660 S.W.2d 273 (Mo. App., E.D. 1983);  
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State v. Keith Scott, 689 S.W.2d 758 (Mo. App., E.D. 1985);  
State v. Kent Scott, appeal pending;  
State v. Shaw, 646 S.W.2d 52 (Mo. 1983);  
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State v. Stith, 660 S.W.2d 419 (Mo. App., S.D. 1983);  
State v. Strickland, 609 S.W.2d 392 (Mo. banc 1981);  
State v. Stuckey, 680 S.W.2d 931 (Mo. banc 1984);  
State v. Tate, appeal pending;  
State v. Taylor, appeal pending;  
State v. Thomas, 625 S.W.2d 115 (Mo. 1981);  
State v. Turner, 623 S.W.2d 4 (Mo. banc 1981), cert. denied, \_\_\_ U.S. \_\_\_ (1986);  
State v. Valentine, 646 S.W.2d 729 (Mo. 1983);  
State v. Washington, 707 S.W.2d 463 (Mo. App., E.D. 1986);  
State v. Weatherspoon, 716 S.W.2d 379 (Mo. App., W.D. 1986);  
State v. Webster, 659 S.W.2d 286 (Mo. App., E.D. 1983);  
State v. Donnell White, 694 S.W.2d 802 (Mo. App., W.D. 1985);  
State v. Michael White, 622 S.W.2d 939 (Mo. banc 1981), cert. denied, 456 U.S. 963 (1982);  
State v. Doyle Williams, 662 S.W.2d 277 (Mo. App., E.D. 1983);  
State v. Ernest Williams, 659 S.W.2d 309 (Mo. App., E.D. 1983);  
State v. James Williams, 678 S.W.2d 845 (Mo. App., E.D. 1984);  
State v. Rondell Williams, 710 S.W.2d 395 (Mo. App., E.D. 1986);  
State v. Vicky Lynn Williams, 611 S.W.2d 26 (Mo. banc 1981);

State v. Wilson, 645 S.W.2d 372 (Mo. 1983);  
 State v. Wirth, 715 S.W.2d 4 (Mo. App., W.D. 1986);  
 State v. Burton Woods, III, 662 S.W.2d 527 (Mo. App.,  
 E.D. 1983);  
 State v. Willard Woods, 639 S.W.2d 818 (Mo. 1982);  
 State v. Woolsey, 664 S.W.2d 37 (Mo. App., W.D. 1984);  
 State v. Yingst, 651 S.W.2d 641 (Mo. App., S.D. 1983);  
 and  
 State v. Zietvogel, 655 S.W.2d 678 (Mo. App., W.D.  
 1983).

CITATIONS TO APPENDIX B  
DEATH PENALTY CASES

State v. Antwine, Supreme Court No. 67720, appeal  
 pending;  
 State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), cert.  
 denied, 459 U.S. 1183 (1983);  
 State v. Bannister, 680 S.W.2d 141 (Mo. banc 1984),  
 cert. denied, --U.S.--, 105 S.Ct. 1879 (1985);  
 State v. Battle, 661 S.W.2d 487 (Mo. banc 1983), cert.  
 denied, 463 U.S. 993 (1984);  
 State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985);  
 State v. Blair, 638 S.W.2d 739 (Mo. banc 1982); cert.  
 denied, 459 U.S. 1188 (1983), reh'g. denied, 459  
 U.S. 1229 (1983);  
 State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982), cert.  
 denied, 459 U.S. 1137 (1983);  
 State v. Boliek, 706 S.W.2d 847 (Mo. banc 1986);  
 State v. Byrd, 676 S.W.2d 494 (Mo. banc 1984), cert.  
 denied, --U.S.--, 105 S.Ct. 1233 (1985);  
 State v. Cavaness, Supreme Court No. 67810, appeal  
 pending;  
 State v. Chambers, 671 S.W.2d 781 (Mo. banc 1984);  
 State v. Chambers, 714 S.W.2d 527 (Mo. banc 1986);  
 State v. Driscoll, 711 S.W.2d 512 (Mo. banc 1986);  
 State v. Foster, 700 S.W.2d 440 (Mo. banc 1985), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2907 (1986);  
 State v. Gilmore, 650 S.W.2d 627 (Mo. banc 1983);  
 State v. Gilmore, 697 S.W.2d 172 (Mo. banc 1985), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2906 (1986);  
 State v. Gilmore, 661 S.W.2d 519 (Mo. banc 1983), cert.  
 denied, 466 U.S. 945 (1984);  
 State v. Gilmore, 681 S.W.2d 934 (Mo. banc 1984), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2906 (1986);  
 State v. Griffin, 662 S.W.2d 854 (Mo. banc 1983), cert.  
 denied, 469 U.S. 873, 105 S.Ct. 224 (1984);  
 State v. Guinan, 665 S.W.2d 325 (Mo. banc 1984), cert.  
 denied, 469 U.S. 873 (1986);  
 State v. Harvey, 692 S.W.2d 290 (Mo. banc 1985);  
 State v. Johns, 679 S.W.2d 253 (Mo. banc 1984), cert.  
 denied, --U.S.--, 105 S.Ct. 1313 (1985);  
 State v. Jones, 705 S.W.2d 19 (Mo. banc 1986), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3206 (1986);

State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1500 (1986);  
 State v. LaRette, 648 S.W.2d 96 (Mo. banc 1983), cert.  
 denied, 464 U.S. 908 (1983), reh'g denied, 464  
 U.S. 1004 (1983);  
 State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984), cert.  
 denied, 469 U.S. 873 (1984);  
 State v. Laws, 661 S.W.2d 526 (Mo. banc 1983), cert.  
 denied, 467 U.S. 1210 (1984);  
 State v. Malone, 694 S.W.2d 723 (Mo. banc 1985), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2292 (1986);  
 State v. Mathenia, 702 S.W.2d 840 (Mo. banc 1986),  
 cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3286 (1986);  
 State v. McDonald, 661 S.W.2d 497 (Mo. banc 1983),  
 cert. denied, 464 U.S. 1306, 105 S.Ct. 1875  
 (1985);  
 State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982);  
 State v. Mercer, 618 S.W.2d 1 (Mo. banc 1981), cert.  
 denied, 454 U.S. 933 (1981);  
 State v. Nave, 694 S.W.2d 729 (Mo. banc 1985), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1500 (1986);  
 State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982), cert.  
 denied, 459 U.S. 884 (1982), reh'g denied, 459  
 U.S. 1024 (1982);  
 State v. O'Neal, 718 S.W.2d 498 (Mo. banc 1986);  
 State v. Preston, 673 S.W.2d 1 (Mo. banc 1984), cert.  
 denied, 469 U.S. 893 (1984);  
 State v. Roberts, 709 S.W.2d 857 (Mo. banc 1986);  
 State v. Rodden, Supreme Court No. 67253, appeal  
 pending;  
 State v. Schneider, Supreme Court No. 67941, appeal  
 pending;  
 State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982), cert.  
 denied, 459 U.S. 928 (1982);  
 State v. Smith, 649 S.W.2d 417 (Mo. banc 1983), cert.  
 denied, 464 U.S. 908 (1983);  
 State v. Stokes, 638 S.W.2d 715 (Mo. banc 1982), cert.  
 denied, 460 U.S. 1017 (1983);  
 State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), cert.  
 denied, 459 U.S. 1168 (1983);  
 State v. Williams, 652 S.W.2d 102 (Mo. banc 1983);  
 State v. Young, 701 S.W.2d 429 (Mo. banc 1985), cert.  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1959 (1986), reh'g  
 denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3322 (1986); and  
 State v. Zietvogel, 707 S.W.2d 365 (Mo. banc 1986).



IV.

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH IN THAT THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, UNDER ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION, AND UNDER THE CANONS OF INTERNATIONAL LAW AND, FURTHER, IT DEPRIVES APPELLANT OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 10, AND 18(a) OF THE MISSOURI CONSTITUTION BECAUSE

A) DEATH IS DISPROPORTIONATELY SEVERE AND THEREFORE, AN EXCESSIVE PUNISHMENT UNDER INTERNATIONAL AND FEDERAL AND STATE CONSTITUTIONAL LAW IN APPELLANT'S CASE IN THAT THE CIRCUMSTANCES OF THE OFFENSE AND APPELLANT'S CHARACTER AT THE TIME OF THE OFFENSE INDICATE THAT A LIFE SENTENCE WITHOUT PROBATION OR PAROLE FOR FIFTY YEARS WOULD HAVE BEEN A MORE APPROPRIATE SENTENCE; AND

B) THE DEATH PENALTY IS UNJUSTIFIED AS A MEANS OF ACHIEVING ANY LEGITIMATE GOVERNMENTAL END AND IS, THEREFORE, EXCESSIVE, IN THAT THE STATE'S INTEREST IN PROTECTING THE PUBLIC FROM DANGEROUS CRIMINALS WHO COMMIT VIOLENT CRIMES, COULD BE ACHIEVED BY SENTENCING APPELLANT AND OTHER SIMILARLY SITUATED DEFENDANTS TO LIFE IMPRISONMENT WITHOUT PAROLE FOR FIFTY YEARS.

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);  
 Belotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979);  
 Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966);  
 Dorszynski v. U.S., 418 U.S. 424, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974);  
 Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982);  
 Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977);  
 Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958);  
 U.S. Const., amends. VIII and XIV;  
 Mo. Const., Art. I, Section, 2, 10, 18(a) and 21;  
 Section 155.133, RSMo 1978;  
 Section 311.325, RSMo 1978;  
 Section 431.055, RSMo 1978;  
 Section 494.010, RSMo 1978;  
 Section 507.110, RSMo 1978;  
 Section 565.022, RSMo Cum. Supp. 1984;  
 Chapters 210 and 211, RSMo Cum. Supp. 1984;  
 Mo. Stat. Ann. Section 211.071 (Supp. 1985);  
 Federal Youth Corrections Act, 18 U.S.C. Sections 5005-5026;  
 Teeters-Zibulka, "Executions Under State Authority: 1864-1967", R.W. Bowers, Legal Homicide (1984);  
 V. Streib, Death Penalty for Juveniles: Past, Present and Future (1985);  
 V. Streib, Persons on Death Row as of December 1985 for Crimes Committed While Under Age Eighteen (1986);  
 ALI, Model Penal Code, Section 210.6 Comment, 133 (Official Draft & Revised Comment, 1980);  
 American Declaration for the Rights and Duties of Man, adopted at the Ninth International Conference of American States in 1948;  
 Hartman, "Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty", 52 U. of Cinn. L. Rev. 655, 666 n. 44 (1983);  
 U.S. Economic & Social Counsel, Report of the Secretary General on Capital Punishment at 17. U.N. DOC. E/5242 (1973);  
 Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. L/XVI.1.1, DOC 65 Rev. 1 Corr.1 (1970);  
 International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.S. GAIR Res. Supp. (Nov. 16), at 51, U.S. DOC A-6316 (1966);  
 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 Section 75 U.N.T.S. 287;

ALI Model Penal Code Section 210.6(1)(d) (Proposed Official Draft, 1962); Section 210.6, Comment, 1331 Official Draft & Revised Comments (1980); ABA Report No. 117A, approved August 1983; and Carlson, Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Form Discipline for the Hopelessly Delinquent, 33 U. Fla. L. Rev. 344, 360-61 (1983).

552.020. Lack of mental capacity hat to trial or conviction—psychiatric examination, when, report of—commitment to hospital, when—statements of accused inadmissible, when.—  
1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on

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CRIMINAL PROCEEDINGS INVOLVING MENTAL ILLNESS

552.020

behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused; or shall direct the director to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals. The order shall direct that a written report or reports of such examination be filed with the clerk of the court. No private physician, psychiatrist, or psychologist shall be appointed by the court unless he has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper, except that, if the order directs the director or the department to have the accused examined, the director, or his designee, shall determine the time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses. The department shall establish standards and provide training for those individuals performing examinations pursuant to this section and section 552.030. No individual who is employed by or contracts with the department shall be designated to perform an examination pursuant to this chapter unless the individual meets the qualifications so established by the department. Any examination performed pursuant to this subsection shall be completed and filed with the court within sixty days of the order unless the court for good cause orders otherwise. Nothing in this section or section 552.030 shall be construed to permit psychologists to engage in any activity not authorized by chapter 337, RSMo.

3. A report of the examination made under this section shall include:

(1) factual findings;

(2) the opinion as to whether the accused has mental disease or defect;

(3) the opinion as to whether the accused is mentally retarded or mentally ill;

(4) the opinion as to whether the accused is mentally ill.

nation, by the court, of mental fitness to proceed; and

(5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. If the accused has pleaded lack of responsibility due to mental disease or defect or has given the written notice provided in subsection 2 of section 552.030, the court shall order the report of the examination conducted pursuant to this section to include, in addition to the information required in subsection 3 of this section, an opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law.

5. If the report contains the recommendation that the accused should be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admitted to bail or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within ten days after the filing of the report, both the defendant and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subsection shall be completed and a report filed with the court within sixty days unless the court, for good cause, orders otherwise. A copy shall be furnished the opposing party.

7. If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subsections 2 and 3 of this section, the court may make a determination and finding on the basis of the report filed or may hold a hearing on its own motion. If the report is contested, the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue and the parties conducting any

(2) Within ten days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or

11 The result of any examination, test, or investigation pursuant to this section shall not be a public record or open to the public.

(1972) Where a copy of report of mental examination was furnished to prosecutor and contained a statement of facts made by appellant to the doctor concerning the crime with which he was charged but there was nothing in record, and appellant pointed to nothing, indicating that prosecutor thereby obtained information concerning the case not otherwise available to him, court did not err in failing to dismiss information. *State v. Franklin* (Mo.), 442 S.W.2d 420.

(1972) This section does not apply to post trial procedure. A conviction without defendant is legally incompetent violates due process. *Strawn v. State* (Mo.), 445 S.W.2d 424.

(1973) State is liable for order and commitment without express written notice of reasons. Other defense exists. *Ex parte Smith* (Mo.), 446 S.W.2d 449. *Cott. comm.* 64 S.Ct. 549.

(1973) Attempted suicide during trial did not require trial judge to order psychiatric examination under this section. Scope of discretion of trial judge discussed. *Drope v. State* (A.), 448 S.W.2d 838.

(1973) Held that mental psychiatric examination report became a record in the criminal proceeding and court could take judicial notice of its contents when considering a motion to vacate. *State v. Conner* (A.), 300 S.W.2d 300.

(1975) After receiving report of psychiatric examination indicating defendant's competency, his attorneys were under no duty to contest the results and to order to charge his attorneys with ineffective assistance defendant must be required to show some basis for questioning the report. *Shubert v. State* (A.), 515 S.W.2d 326.

(1975) This section constitutionally adequate to protect rights of accused. Suicide attempt during trial and psychiatric information available prior to trial together with testimony as to strange behavior creates a sufficient doubt of competence to require further inquiry on the question of competence. *Drope v. State* (Mo.), 448 S.W.2d 838.

(1975) May state at preliminary hearing fix jurisdiction to require into accused's mental fitness to proceed. *State v. Wright* (A.), 520 S.W.2d 431.

(1975) If defendant's examination by psychiatrist who was not a licensed psychiatrist met the requirements of this section. *State v. Walker* (A.), 512 S.W.2d 74.

(1976) Held defendant is entitled to a competency hearing when charges against him are filed until day of trial. *State v. Smith* (Mo.), 450 S.W.2d 838.

(1976) Held, trial of report is considered the court must hold a competency hearing. *State v. Conner* (A.), 300 S.W.2d 300.

(1976) Defense is entitled to be heard in a hearing upon its motion to vacate a conviction if state trial court on appeal has not held a competency hearing. *State v. Smith* (Mo.), 450 S.W.2d 838.

(1981) The accused, for the purpose of attempting to establish his partial responsibility or his diminished capacity, may introduce evidence obtained in the section 4720 examination. *State v. Strubbe* (Mo.), 616 S.W.2d 820.



**56S.020. First degree murder, penalty.—**

1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

(1. 1983 S.B. 276)

Effective 10-1-84 (L. 1984 S.B. 449 § A)

Execution, location, dates of the warden. RSMo 540.738

**DEATH PENALTY FOR JUVENILES:**

**PAST, PRESENT AND FUTURE**

by

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1985

EXHIBIT C

Death sentences and actual executions of persons for crimes committed while under age eighteen are rare but persistent phenomena which have spanned 343 years of American history. They began in Plymouth Colony, Massachusetts, in 1642 and have continued through 1985. Our past practice of executing juveniles reveals surprising facts and policies. Our current practice is no less surprising, absent a presumption that attitudes and policies should have changed after three and one-half centuries. The future seems fairly promising and may provide one small victory for opponents of the death penalty in their dark and dreary war against killing human beings to achieve governmental goals of justice.

#### Past Executions of Juveniles:

The most current list of verified executions of persons for crimes committed while under age eighteen establishes the total at 271 such persons. The first was Thomas Graunger, age sixteen or seventeen, who was executed in 1642 in Plymouth Colony, Massachusetts, for buggery of cattle. The last, as of this writing, was Charles Rumbaugh, age seventeen at the time of his robbery and murder of a jeweler, executed at age twenty-eight in Huntsville, Texas, on September 11, 1985.

The range of ages at the time of their crimes is from age seventeen down to age ten. The youngest ever at the time of his crime was James Arcene, executed by the federal government in Arkansas on June 26, 1885, for a crime committed when he was only ten years old. In this century, credit for executing the youngest offenders seems to be a contest between Florida and South Carolina. On April 27, 1927, Florida executed Fortune Ferguson, Jr., for a crime he committed when he was only thirteen or fourteen although he had reached age sixteen before being executed. South Carolina executed George Junius Stinney, Jr., on June 16, 1944, for a crime he committed at age fourteen and he was still only fourteen when executed.

Only nine of these 271 executed juveniles were females. Their ages ranged from twelve through seventeen. Beginning in 1786, the last execution of a juvenile girl was in 1912. However, as the appended list indicates, a juvenile girl currently awaits her execution on Georgia's death row.

The races of the offenders and victims in these 271 cases are quite predictable. Of the 271 offenders, 70% were black and 24% were white. For the victims of their crimes, 7% were black and 90% were white. The crimes were primarily murder (81%) but 15% were executed for rape and even a few were executed for attempted rape and attempted robbery.

#### Present Death Sentences for Juveniles:

As of October 1, 1985, a total of 1,590 persons are under a sentence of death and are imprisoned on the death rows of thirty-two states. Of this total death row population, thirty-two persons are on the death rows of sixteen states for crimes committed while under the age of eighteen. Although under the typical age limit for juvenile court when they committed their

crimes, some of them have been on death row for seven to ten years and are now in their mid-twenties. All thirty-two were convicted and sentenced to death for the crime of murder. The age, sex and race characteristics of these thirty-two persons are as follows:

<u>Age at Time of Offense</u>	<u>Sex of Prisoner</u>	<u>Race of Prisoner</u>
age 15 = 4	male = 31	white = 16
age 16 = 6	female = 1	black = 16
age 17 = 22	total = 32	total = 32
total = 32		

For the names of the thirty-two presently condemned juveniles and some information about their crimes and sentences, see the list appended to this report.

#### Future Perspective on the Death Penalty for Juveniles:

The total of thirty-two persons now on death row for crimes committed while under age eighteen is lower than at any time in recent history. In December, 1983, thirty-seven of the 1,289 persons then on death row (2.9%) had been under age eighteen at the time of their crimes. In December, 1984, the number was thirty-three of the 1,464 persons then on death row (2.3%). In October, 1985, the number has fallen to thirty-two of the 1,590 persons now on death row (2.0%).

Thus, even though the total death row population continues to grow by about 175 persons each year, the juvenile death row population continues to shrink. In 1984, only three such juveniles were sentenced to death (Rushing in Louisiana, Brown in North Carolina and Thompson in Oklahoma). For the first ten months of 1985, only two juveniles have been sentenced to death (Ward in Arkansas and Morgan in Florida). Generally, this steady decline in juvenile death sentences stems from the reluctance of prosecutors to bring capital cases and of juries to return capital sentences against juveniles. A large majority of capital punishment states still legally authorize such juvenile death penalties but the system seems more and more unwilling to impose them.

The practice of actually executing such juveniles has similarly declined to almost nil. However, the execution in Texas of Charles Rumbaugh on September 11, 1985, reminds us that the practice has not yet disappeared. Rumbaugh had been only seventeen years old at the time of his crime but had reached the age of twenty-eight when he was finally executed, having spent almost ten years on death row in Texas.

Several state legislatures are being asked to amend their death penalty statutes to establish a minimum for age at time of the crime. The American Bar Association, a fairly conservative organization which has never opposed the death penalty per se, has adopted an official policy opposing the death penalty for crimes committed while under age eighteen. Public opinion surveys as to attitudes about the death penalty continue to find

overwhelming support for it in general but majority opposition to the death penalty for crimes committed while under age eighteen. Death penalty states are ripe for legislative lobbying and litigative argument opposing the death penalty for juveniles. The practice is disappearing even without changes in the law and the law makers can jump on the bandwagon. Even if the prospects are dismal for convincing them to stop killing our adult brothers and sisters in the name of justice, they seem willing to listen to reasons why they should stop killing our children.

#### APPENDIX: JUVENILES CURRENTLY ON DEATH ROW

##### ALABAMA:

Davis, Timothy: 17 at crime; white male; raped and murdered a sixty-year-old woman in a small town grocery store.

Jackson, Carmel: 16 at crime; black male; robbed and abducted Mr. and Mrs. Tucker, raped Mrs. Tucker and murdered them with shotgun; convicted and sentenced to death in November, 1981.

Lynn, Frederick: 16 at crime; black male; burglarized and murdered sixty-one-year-old widow in February, 1981; originally convicted and sentenced to death but new sentence currently pending.

##### ARKANSAS:

Ward, Ronald: 15 years and six months at crime; black male; killed three white persons, twelve-year old male, seventy-two-year-old female and seventy-six-year-old female, also raping one of the females, in April 1985; convicted of murder and sentenced to death on September 20, 1985.

##### FLORIDA:

Magill, Paul: 17 years and 10 months at crime; white male; kidnapped, raped and murdered twenty-five-year-old store clerk in December, 1976; tried, convicted and originally sentenced to death in March, 1977; sentenced vacated but resentenced to death in 1981. On death row for over eight years.

Morgan, James: 16 at crime; white male; sexually assaulted and murdered a sixty-six-year-old widow in 1977; convicted and originally sentenced to death in 1978; sentenced reversed twice but again sentenced to death on June 7, 1985.

##### GEORGIA:

Burger, Christopher: 17 years and 8 months at crime; white male; robbed, kidnapped, sodomized and drowned male cab driver in September, 1977; convicted and sentenced to death but sentence reversed; death sentence subsequently reimposed. On death row almost eight years.

Buttrum, Janice: 17 years and 8 months at crime; white female; assisted husband in raping, robbing and killing female adult, stabbing her 97 times, in September, 1980; husband also convicted and sentenced to death but committed suicide.

High, Jose: 16 years and 11 months at crime; black/hispanic male; kidnapped and killed eleven-year-old boy in July, 1976; convicted and sentenced to death in November, 1978. On death row almost seven years.

Legare, Andrew: 17 at crime; white male; escaped from Youth Development Center and burglarized and killed handicapped man in May 1977; convicted and originally sentenced to death; sentence reversed but resentenced to death.

##### INDIANA:

Thompson, Jay: 17 at crime; white male; burglarized and murdered elderly couple in Petersburg, Indiana; convicted and sentenced to death in March, 1982.

##### KENTUCKY:

Stanford, Kevin: 17 at crime; black male; robbed, kidnapped, raped and murdered a young white woman; convicted and sentenced to death in August, 1982.

##### LOUISIANA:

Prejean, Dalton: 17 at crime; black male; shot and killed state trooper in July, 1977; convicted and sentenced to death in May, 1978. On death row for seven years.

Rushing, David: 17 at crime; white male; robbed and murdered cab driver; convicted and sentenced to death on testimony of accomplice.



MARYLAND:

Trimble, James: 17 years and 8 months at crime; white male; raped, beat and killed a young white woman in July, 1981; convicted and sentenced to death in March, 1982.

MISSISSIPPI:

Jones, Larry: 17 at crime; black male; robbery of retail store with two co-felons during which owner (WM in 70s) was killed on Dec. 2, 1974; convicted and sentenced to death in March 1975 but reversed on appeal; retried in December 1977 and again sentenced to death; sentence reversed by federal district court and affirmed by Fifth Circuit in September 1984; retrial uncertain.

Tokman, George: 17 years and 6 months at crime; white male; robbed and killed an elderly black cab driver in August, 1980; convicted and sentenced to death in September, 1981.

MISSOURI:

Lashley, Frederick: 16 at crime; black male; robbed and killed his handicapped, fifty-five-year-old foster mother in April, 1981; convicted and sentence to death.

NEW JERSEY:

Bey, Marko: 17 years and 11 months at crime; black male; raped and killed two teenage women in April, 1983; convicted and sentenced to death in September, 1983

NORTH CAROLINA:

Brown, Leon: 15 years and 9 months at crime; black male; along with older brother, raped and killed eleven-year-old black girl in September, 1983; convicted and sentenced to death in October, 1984.

Stokes, Freddie Lee: 17 at crime; black male; robbed and murdered adult white male in December, 1981; convicted and sentenced to death in June 1982; sentence reversed but resentenced to death.

OKLAHOMA:

Thompson, Wayne: 15 at crime; white male; along with older brother and two others, kidnapped, beat and killed ex-brother-in-law; convicted and sentenced to death in the spring of 1984.

PENNSYLVANIA:

Aulisio, Joseph: 15 at crime; white male; killed two white children, a girl age 8 and a boy age 4, in July, 1981; convicted and sentenced to death in May, 1982.

Hughes, Kevin: 16 at crime; black male; raped and killed a nine-year-old girl in 1979; convicted and sentenced to death in March, 1981.

SOUTH CAROLINA:

Roach, James Terry: 17 years and 8 months at crime; white male; along with others he raped and killed a fourteen-year-old girl and killed her boyfriend in October, 1977; confessed and was convicted and sentenced to death in December, 1977. On death row over seven years.

TEXAS:

Burns, Victor Renay: 17 at crime; black male; with older brother and another friend, robbed and killed young factory worker.

Cannon, Joseph John: 17 at crime; white male; robbed and murdered adult woman.

Carter, Robert A.: 17 at crime; black male; robbed and killed teenage female clerk at small store in June, 1981; convicted and sentenced to death in March, 1982.

Garrett, Johnny Frank: 17 at crime; white male; raped and killed a seventy-six-year-old nun.

Graham, Gary: 17 at crime; black male; robbed and murdered an adult male in May, 1981.

Harris, Curtis Paul: 17 at crime; black male; along with older brother, robbed and killed an adult male.

Pinkerton, Jay K.: 17 at crime; white male; raped and killed two young white women in 1979; convicted and sentenced to death; execution stayed by U.S. Supreme Court on August 14, 1985, only a few minutes prior to scheduled execution.

PERSONS ON DEATH ROW AS OF DECEMBER 1985 FOR  
CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

by

Victor L. Streib  
Cleveland-Marshall College of Law  
Cleveland State University  
Cleveland, Ohio 44115  
(216) 687-2311

Prepared for distribution to  
research colleagues and for  
use in ongoing litigation.

January 1986

©  
Victor L. Streib  
1986

EXHIBIT D

As of December 20, 1985, a total of thirty-two persons are on death row for crimes committed while under age eighteen. This total of thirty-two condemned persons under the typical juvenile court age is less than at any time in recent history. In December, 1983, thirty-seven of the 1,289 persons then on death row (2.9%) had been under age eighteen at the time of their crimes. In December, 1984, the number was thirty-three of the 1,464 persons then on death row (2.3%). In December, 1985, the number has fallen to thirty-two of the 1,642 persons now on death row (1.9%).

Thus, even though the total death row population continues to grow by about 175 persons each year, the juvenile death row population continues to shrink. In 1984, only three such juveniles were sentenced to death (Rushing in Louisiana, Brown in North Carolina and Thompson in Oklahoma). Similarly, only three juveniles were sentenced to death in 1985 (Ward in Arkansas, and Livingston and Morgan in Florida). Generally, this steady decline in juvenile death sentences stems mostly from the reluctance of prosecutors to bring capital cases and of juries to return capital sentences against juveniles. A large majority of capital punishment states still legally authorize such juvenile death penalties but the criminal justice system seems more and more unwilling to impose them.

The practice of actually executing such juveniles has similarly declined to almost nil. However, the execution in Texas of Charles Rumbaugh on September 11, 1985, reminds us that the practice has not yet disappeared. Rumbaugh had been only seventeen years old at the time of his crime but had reached the age of twenty-eight when he was finally executed, having spent almost ten years on death row in Texas. South Carolina has scheduled the execution of James Terry Roach for January 10, 1986. Like Rumbaugh, Roach was only seventeen at the time of his crime.

As of December 20, 1985, a total of 1,642 persons are under a sentence of death and are imprisoned on the death rows of thirty-two states. Of this total death row population, thirty-two persons are on the death rows of sixteen states for crimes committed while under the age of eighteen. Although under the typical age limit for juvenile court when they committed their crimes, some of them have been on death row for seven to nine years and are now in their late twenties. All thirty-two were convicted and sentenced to death for the crime of murder. The age, sex and race characteristics of these thirty-two persons are as follows:

<u>Age at Time of Offense</u>	<u>Sex of Prisoner</u>	<u>Race of Prisoner</u>
age 15 = 4	male = 31	white = 16
age 16 = 8	female = 1	black = 16
age 17 = 23	total = 32	total = 32
total = 35		

The 32 condemned juvenile offenders are as follows:

ALABAMA:

Davis, Timothy: 17 at crime; white male; raped and murdered a sixty-year-old woman in a small town grocery store.

Jackson, Carnel: 16 at crime; black male; robbed and abducted Mr. and Mrs. Tucker, raped Mrs. Tucker and murdered them with shotgun; convicted and sentenced to death in November, 1981.

ARKANSAS:

Ward, Ronald: 15 years and six months at crime; black male; killed three white persons, twelve-year old male, seventy-two-year-old female and seventy-six-year-old female, also raping one of the females, in April 1985; convicted of murder and sentenced to death on September 20, 1985.

FLORIDA:

Livingston, Jesse James: 17 at crime; black male; shot and killed adult female store clerk during robbery in February 1985; convicted in September and sentenced to death in October 1985.

Magill, Paul: 17 years and 10 months at crime; white male; kidnapped, raped and murdered twenty-five-year-old store clerk in December, 1976; tried, convicted and originally sentenced to death in March, 1977; sentenced vacated but resentenced to death in 1981. On death row for almost nine years.

Morgan, James: 16 at crime; white male; sexually assaulted and murdered a sixty-six-year-old widow in 1977; convicted and originally sentenced to death in 1978; sentence reversed twice but again sentenced to death on June 7, 1985.

GEORGIA:

Burger, Christopher: 17 years and 8 months at crime; white male; robbed, kidnapped, sodomized and drowned male cab driver in September, 1977; convicted and sentenced to death but sentence reversed; death sentence subsequently reimposed. On death row almost eight years.

Buttrum, Janice: 17 years and 8 months at crime; white female; assisted husband in raping, robbing and killing female adult, stabbing her 97 times, in September, 1980; husband also convicted and sentenced to death but committed suicide.

High, Jose: 16 years and 11 months at crime; black/hispanic male; kidnapped and killed eleven-year-old boy in July, 1976; convicted and sentenced to death in November, 1978. sentence currently being reconsidered. On death row over seven years.

Legare, Andrew: 17 at crime; white male; escaped from Youth Development Center and burglarized and killed handicapped man in May 1977; convicted and originally sentenced to death; sentence reversed but resentenced to death.

INDIANA:

Thompson, Jay: 17 at crime; white male; burglarized and murdered elderly couple in Petersburg, Indiana; convicted and sentenced to death in March, 1982.

KENTUCKY:

Stanford, Kevin: 17 at crime; black male; robbed, kidnapped, raped and murdered a young white woman; convicted and sentenced to death in August, 1982.

LOUISIANA:

Prejean, Dalton: 17 at crime; black male; shot and killed state trooper in July, 1977; convicted and sentenced to death in May, 1978. On death row for seven years.

Rushing, David: 17 at crime; white male; robbed and murdered cab driver; convicted and sentenced to death on testimony of accomplice.

MARYLAND:

Trimble, James: 17 years and 8 months at crime; white male; raped, beat and killed a young white woman in July, 1981; convicted and sentenced to death in March, 1982.



MISSISSIPPI:

Jones, Larry: 17 at crime; black male; robbery of retail store with two co-felons during which owner (WM in 70s) was killed on Dec. 2, 1974; convicted and sentenced to death in March 1975 but reversed on appeal; retried in December 1977 and again sentenced to death; sentence reversed by federal district court and affirmed by Fifth Circuit in September 1984; retrial uncertain.

Tokman, George: 17 years and 6 months at crime; white male; robbed and killed an elderly black cab driver in August, 1980; convicted and sentenced to death in September, 1981.

MISSOURI:

Lashley, Frederick: 16 at crime; black male; robbed and killed his handicapped, fifty-five-year-old foster mother in April, 1981; convicted and sentenced to death.

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Stokes, Freddie Lee: 17 at crime; black male; robbed and murdered adult white male in December, 1981; convicted and sentenced to death in June 1982; sentence reversed but resentenced to death.

OKLAHOMA:

Thompson, Wayne: 18 at crime; white male; along with older brother and two others, kidnapped, beat and killed ex-brother-in-law; convicted and sentenced to death in the spring of 1984.

PENNSYLVANIA:

Aulisio, Joseph: 15 at crime; white male; killed two white children, a girl age 8 and a boy age 4, in July, 1981; convicted and sentenced to death in May, 1982.

Hughes, Kevin: 16 at crime; black male; raped and killed a nine-year-old girl in 1979; convicted and sentenced to death in March, 1981.

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Roach, James Terry: 17 years and 8 months at crime; white male; along with others he raped and killed a fourteen-year-old girl and killed her boyfriend in October, 1977; confessed and was convicted and sentenced to death in December, 1977. On death row over eight years. Execution presently scheduled for January 10, 1986.

TEXAS:

Burns, Victor Renay: 17 at crime; black male; with older brother and another friend, robbed and killed young factory worker. Sentence currently being reconsidered.

Cannon, Joseph John: 17 at crime; white male; robbed and murdered adult woman.

Carter, Robert A.: 17 at crime; black male; robbed and killed teenage female clerk at small store in June, 1981; convicted and sentenced to death in March, 1982.

Garrett, Johnny Frank: 17 at crime; white male; raped and killed a seventy-six-year-old nun.

Graham, Gary: 17 at crime; black male; robbed and murdered an adult male in May, 1981.

Harris, Curtis Paul: 17 at crime; black male; along with older brother, robbed and killed an adult male.

Pinkerton, Jay K.: 17 at crime; white male; raped and killed two young white women in 1979-1980; convicted and sentenced to death; execution stayed by U.S. Supreme Court on August 14, 1985, and on November 25, 1985, each time only a few minutes or hours prior to scheduled execution.

COUNTY OF BOONE )  
 ) S.S.  
STATE OF MISSOURI )

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987

HEATH A. WILKINS. )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
STATE OF MISSOURI. )  
 )  
Respondent. )

No. **87-6026**

CERTIFICATE OF FILING BY MAIL OF  
PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MISSOURI

Having been duly sworn, Lew A. Kollias, attorney for the  
Petitioner, pursuant to Rule 28.2, certifies to this Court that a  
Petition for Writ of Certiorari in this case is due on December  
12, 1987, and that he filed the petition and accompanying in  
forma pauperis motion and affidavit with the Court within the  
time allowed, by mailing them on December 8, 1987, by United  
States Mail, first class postage prepaid, addressed to Mr. Joseph  
F. Spaniol, Jr., Clerk, Supreme Court of the United States, One  
First Street, N.E., Washington, D.C. 20543.

Respectfully submitted,

Lew A. Kollias  
Lew A. Kollias  
Attorney for Petitioner  
209B East Green Meadows Road  
Columbia, Missouri 65203-3698  
(314) 442-1101

Supreme Court, U.S.  
FILED  
DEC 10 1987  
JOSEPH F. SPANIOLO, JR.  
CLERK

scd Subscribed and sworn to before me, a Notary Public, on this  
day of December, 1987.

Deborah R. Dizek  
Deborah R. Dizek, Notary Public

My Commission Expires August 17, 1990.

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987

Supreme Court, U.S.  
FILED  
DEC 10 1987  
JOSEPH F. SPANGL JR.  
CLERK

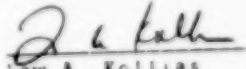
HEATH A. WILKINS,  
Petitioner,  
vs  
STATE OF MISSOURI,  
Respondent.

No. **87-6026**

CERTIFICATE OF SERVICE OF  
PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MISSOURI

Comes now, Lew A. Kollias, attorney for Petitioner, to  
certify that on the 8th day of December, 1987, I mailed by United  
States Postal Service, postage prepaid, one copy of the Petition  
for Writ of Certiorari and accompanying in forma pauperis motion  
and affidavit in this case to Mr. William Webster, Attorney  
General of the State of Missouri, P.O. Box 899, Jefferson City,  
Missouri 65102, counsel for Respondent. I further certify that  
all parties required to be served have been served.

Respectfully submitted,

  
Lew A. Kollias  
Attorney for Petitioner  
209B East Green Meadows Road  
Columbia, Missouri 65203-3698  
(314) 442-1101

COUNTY OF BOONE )  
STATE OF MISSOURI ) S.S.

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987

Supreme Court, U.S.  
FILED  
DEC 10 1987  
JOSEPH F. SPANGL JR.  
CLERK


HEATH A. WILKINS,  
Petitioner,  
vs  
STATE OF MISSOURI,  
Respondent.

No. **87-6026**

ENTRY OF APPEARANCE FOR  
PETITION FOR WRIT OF CERTIORARI TO THE  
MISSOURI COURT OF APPEALS, EASTERN DISTRICT

Comes now, Lew A. Kollias, a member of the Bar of the United  
States Supreme Court, to enter his appearance as attorney for the  
Petitioner in this case. Mr. Kollias' address is Office of State  
Public Defender, 209B East Green Meadows Road, Columbia, Missouri  
65203-3698. He also can be reached at (314) 442-1101.

Respectfully submitted,

  
Lew A. Kollias  
Attorney for Petitioner



6

W

**ORIGINAL**

No. 87-6026

Supreme Court, U.S.  
**FILED**  
JAN 4 1988  
JOSEPH F. SPANIO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

HEATH A. WILKINS,  
Petitioner,  
vs.  
STATE OF MISSOURI,  
Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

-----  
WILLIAM L. WEBSTER  
Attorney General of Missouri

JOHN M. MORRIS III  
Assistant Attorney General

P.O. Box 899  
Jefferson City, Missouri 65102  
(314) 751-3321

Attorneys for Respondent

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#### STATEMENT OF THE CASE

Petitioner Heath A. Wilkins entered a plea of guilty on May 9, 1986, to first degree murder, §565.020, RSMo 1986, and after a hearing on punishment he received a sentence of death. Prior to his guilty plea and punishment proceeding, in which petitioner affirmatively requested that he be sentenced to death, a hearing was held on his competency to stand trial, and petitioner was found to be competent. The details of petitioner's competency hearing, guilty plea and sentencing, as well as the facts surrounding his stabbing murder of 26-year-old Nancy Allen, are set out in the opinion of the Supreme Court of Missouri affirming his conviction and sentence and will not be restated here. State v. Wilkins, 736 S.W.2d 409, 410-414 (Mo. banc 1987) (Petitioner's Appendix, hereinafter "Pet.App.", at 1-5).

Respondent does not dispute that the three claims raised by petitioner in his petition were properly presented to the Supreme Court of Missouri.

#### ARGUMENT

##### 1. Constitutionality of Capital Punishment

At the time of his murder of Nancy Allen, petitioner was sixteen years and seven months of age. Under Missouri law, persons under the age of seventeen are under the jurisdiction of the juvenile code but may be certified for trial as adults. Sections 211.021, 211.031 and 211.071, RSMo 1986. Petitioner was so certified. State v. Wilkins, 736 S.W.2d 409, 412 (Mo. banc 1987) (Pet.App. 3). Petitioner asserts that "the imposition of a death sentence for an offense committed by a child [sic] below the age of eighteen constitutes cruel and unusual punishment" (petition at 5-6).

Although the constitutionality of imposing a death sentence upon young persons is currently before this Court in Thompson v. Oklahoma, No. 86-6169, cert. granted 107 S.Ct. 1284 (1987), petitioner's argument sweeps more broadly than the facts presented either in Thompson or in the case at bar. The defendant in Thompson was fifteen years old at the time of the crime, Thompson v. State, 724 P.2d 780, 784 (Okla.Cr. 1986), and the petitioner at bar was sixteen. Under the law of many states, including Missouri, seventeen-year-olds are adults and cease to be subject to juvenile-court jurisdiction. Thus, petitioner's selection of age eighteen as the constitutional limit for capital punishment demonstrates the arbitrary and unrealistic character of the "bright line" he attempts to draw.

As this Court has repeatedly held, the touchstone of capital sentencing is individualized consideration of each defendant's character and history and the circumstances of his crime. See Zant v. Stephens, 462 U.S. 862, 879 (1983). A defendant's chronological age is only one of many circumstances which weigh in his balance. If anything, it is a highly unreliable indicator, since an individual's maturity,



intelligence and sophistication may have little or nothing to do with his age and may vary widely from person to person. Categorically exempting an entire class of persons by reason of chronological age is precisely the kind of rigid and mechanical test that this Court has held should not be employed in capital sentencing. Barclay v. Florida, 463 U.S. 939, 950 (1983). A death sentence should not be automatically imposed, Sumner v. Shuman, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2716, 2721-2723, \_\_\_ L.Ed.2d \_\_\_ (1987), nor should it be automatically foreclosed, Tison v. Arizona, \_\_\_ U.S. \_\_\_, 107 S.Ct. 1676, 1687, 95 L.Ed.2d 127 (1987). If limits are to be placed upon the imposition of capital punishment, they must be placed by the legislature, and "a heavy burden rests upon those who would attack the judgment of the representatives of the people." Gregg v. Georgia, 428 U.S. 153, 175 (1976). "nothing in society's standards of decency compel more than consideration of an eighteen year old's youth as a mitigating factor." High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987), quoting Prejean v. Blackburn, 743 F.2d 1091, 1090 (5th Cir. 1984); see also Roach v. Martin, 757 F.2d 1463, 1483 (4th Cir. 1985).<sup>1</sup>

## 2. Standard of Competency

The standard of competency applied to petitioner, under which he was found competent, was whether "as a result of mental disease or defect [he] lacks capacity to understand the proceedings against him or to assist in his own defense." Section 552.020.1, RSMo 1986. Petitioner seeks to create a plethora of separate issues of competency for each action a criminal defendant might take: one for defendants proceeding to trial, another for those

<sup>1</sup>A more extensive refutation of petitioner's present argument appears in the amicus curiae brief filed by the State of Kentucky and joined in by the State of Missouri and seventeen other states in Thompson v. Oklahoma, supra.

who plead guilty, yet another for persons who proceed pro se, and a fourth for defendants seeking to consent to a sentence of death.

Petitioner's principal authority for this theory is Westbrook v. Arizona, 384 U.S. 150 (1966), a brief per curiam opinion which pronounces no constitutional principles on the present issue. Petitioner's creative interpretation of Westbrook has been rejected by the vast majority of jurisdictions which have considered it. See United States ex rel. Heral v. Franzen, 667 F.2d 633, 637-638 (7th Cir. 1981); United States ex rel. Cvbert v. Rowe, 638 F.2d 1100, 1102-1104 (7th Cir. 1981) and cases cited therein. Rees v. Peyton, 384 U.S. 312 (1966), cited by petitioner, is equally inapposite. The sole issue addressed in Rees was the competency of a defendant under sentence of death to withdraw a petition for a writ of certiorari. Id. at 313-314. While the principles enunciated in Rees have been applied to capital defendants who have sought to waive other collateral remedies such as federal habeas corpus, e.g., Smith v. Armontrout, 812 F.2d 1050, 1052 (8th Cir. 1987), cert. denied 107 S.Ct. 3277 (1987), it has never been suggested that a defendant's competency to take a position on his punishment at a trial or guilty plea is somehow separate and distinct from his competency to understand and participate in those proceedings. Respondent submits that such a distinction is untenable.

Although respondent believes that the above principles and authorities are sufficient to warrant denial of this petition, it would additionally note that the evidence before the Circuit Court which accepted petitioner's guilty plea was sufficient to establish petitioner's competence to proceed regardless of the standard or standards which may be applied. See State v. Wilkins, supra at 411-414 (Pet.App. 2-5).

## 3. Proportionality

Petitioner asks this Court to determine the appropriateness of the death sentence imposed upon him. He completely fails to acknowledge the holding of this Court in Pulley v. Harris, 465 U.S. 37 (1984) that this presents no federal constitutional issue. The Supreme Court of Missouri extensively addressed the issue of proportionality as provided for under Missouri law, State v. Wilkins, supra at 416-417 (Pet.App. 7-8), and nothing in petitioner's self-serving and one-sided version of the facts renders that proportionality review erroneous, let alone unconstitutional.

CONCLUSION

In view of the foregoing, the respondent submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. WEBSTER  
Attorney General of Missouri

*John M. Morris III*  
JOHN M. MORRIS III  
Assistant Attorney General

P.O. Box 899  
Jefferson City, Missouri 65102  
(314) 751-3321

Attorneys for Respondent

RECEIVED  
U.S. SUPREME COURT

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED  
DEC 10 1987  
JOSEPH F. SPANIOLO, JR.  
CLERK

HEATH A. WILKINS,  
Petitioner,  
vs  
STATE OF MISSOURI,  
Respondent.

No. **87-6026**

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now, Lew A. Kollias, Attorney for Petitioner, and Heath A. Wilkins, Petitioner, who is incarcerated in the Missouri State Penitentiary, to ask leave to file the attached Petition for Writ of Certiorari in the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis. Leave was granted allowing Petitioner to proceed in forma pauperis in the Circuit Court of Clay County and the Supreme Court of the State of Missouri. The Petitioner's affidavit in support of this Petition is attached hereto.

Respectfully submitted,

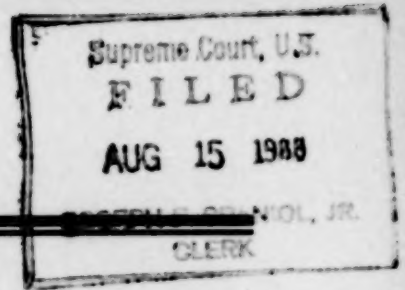
*Lew A. Kollias*

Lew A. Kollias  
Attorney for Petitioner  
209B East Green Meadows Road  
Columbia, Missouri 65203-3698  
(314) 442-1181



No. 87-6026

(4)



In THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

HEATH A. WILKINS,  
*Petitioner,*  
v.  
MISSOURI,  
*Respondent.*

On Writ of Certiorari to the Supreme Court of Missouri

**JOINT APPENDIX**

NANCY A. MCKERROW  
Office of State Public Defender  
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*Counsel for Petitioner*

WILLIAM L. WEBSTER  
Attorney General of Missouri  
JOHN M. MORRIS, III \*  
Assistant Attorney General  
P.O. Box 899  
Jefferson City, Missouri 65102  
(314) 751-3321  
*Counsel for Respondent*

\* Attorney of Record

PETITION FOR CERTIORARI FILED DECEMBER 8, 1987  
CERTIORARI GRANTED JUNE 30, 1988

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## RELEVANT DOCKET ENTRIES

Circuit Court, Clay County, Missouri  
Seventh Judicial Circuit

DATE	PROCEEDINGS
8/15/85	Petition filed to allow prosecution of juvenile under general laws. Defendant arraigned. * * *
10/8/85	Information charging first degree murder filed.
10/17/85	Public defender appears with and on behalf of defendant. Defendant arraigned and enters plea of not guilty by reason of mental disease or defect. * * *
4/16/86	Defendant found competent to proceed. Defendant states a desire to proceed pro se and dismiss the services of the public defender.
4/23/86	Public Defender granted leave to withdraw but ordered to remain available throughout the proceedings.
5/9/86	Defendant waives trial by jury, withdraws plea of not guilty by reason of mental disease or defect, and enters a plea of guilty. The Court accepts the guilty plea to first degree murder.
6/27/86	Defendant waives jury trial and right to counsel at sentencing proceeding. The state adduces evidence. The defendant requests the death penalty. The Court, after finding the existence of two aggravating circumstances, sentences defendant to death.



IN THE CIRCUIT COURT  
OF CLAY COUNTY, MISSOURI  
June Term, A.D. 1985

STATE OF MISSOURI     )  
                              ) ss.  
COUNTY OF CLAY     )

No. CR 185-491 FX

THE STATE OF MISSOURI,  
*Plaintiff*  
against

HEATH A. WILKINS,  
*Defendant*

INFORMATION

James B. Chancellor, (Asst.) Prosecuting Attorney within and for the County of Clay in the State of Missouri, charges that the defendant, in violation of Section 565.020.1, RSMo, committed the Class A felony of murder in the first degree, punishable upon conviction under Section(s) 565.020.2, RSMo, in that on or about July 27, 1985, in the County of Clay, State of Missouri, defendant, after deliberation, knowingly caused the death of Nancy Allen by stabbing her.

Filed October 8, 1985

/s/ James B. Chancellor  
(Asst.) Prosecuting Attorney

James B. Chancellor, (Asst.) Prosecuting Attorney of the County of Clay, State of Missouri, being duly sworn,

upon oath says that the facts stated in the above information are true, according to his best information, knowledge and belief.

/s/ James B. Chancellor

Subscribed and sworn to before me, this 8th day of Oct., A.D., 1985.

Jack K. Roberts  
By /s/ Pamela Hill

IN THE JUVENILE COURT  
OF CLAY COUNTY, MISSOURI

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No. Ju 185-132J

IN THE INTEREST OF HEATH ALLEN WILKINS

Male Age: 16

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**ORDER DISMISSING PETITION  
TO ALLOW PROSECUTION OF  
JUVENILE UNDER GENERAL LAW**

Now on this 15th day of August 1985, there being present Mary A. Elmore, Juvenile Officer of Clay County, and Max Von Erdmannsdorff, attorney for the Juvenile Officer, and Heath Allen Wilkins, the juvenile, and Sherry Lynn Wilkins, the juvenile's mother, and Fred Duchardt, attorney for the juvenile, and the Court hearing the motion of the Juvenile Officer to dismiss the petition heretofore filed in the interest of the juvenile, to allow the juvenile to be prosecuted under the general law, and the Court receiving testimony and other evidence upon said motion, and the report of the investigation required by Sections 211.011 to 211.431 R.S.Mo., and being fully advised in the premises, the Court finds:

1. The petition filed in this cause alleges that the juvenile has committed offenses which would be felonies if committed by an adult, to-wit: did, after deliberation, knowingly kill Nancy Allen by repeatedly stabbing her with a knife, did forcibly steal cigarettes, alcoholic beverages, cigarette papers, a lighter, a cash drawer, and U.S. Currency in excess of \$50, in the charge of Nancy Allen, and in the course thereof did use a dangerous instrument against Nancy Allen.

2. The juvenile is 16 years of age, having been born on the 7th day of January 1969, and the alleged offenses were committed after the juvenile became 14 years of age.

3. The juvenile is not a proper subject to be dealt with under the provisions of the Juvenile Code for the reasons that the offenses alleged involved viciousness, force and violence and the crime complained of is extremely serious and particularly violent to the extent that it constitutes strong evidence that the person guilty thereof is not a fit subject for rehabilitative facilities of the Juvenile Court. Because of the seriousness and viciousness of the crime alleged, the protection of the public is an element which requires the Court's attention in these proceedings. In light of the facts, it is reasonable to conclude from a practical standpoint that only 17 months of rehabilitative confinement or treatment are available and that based upon the crime and the juvenile's present circumstances, such a period is not adequate to rehabilitate him and to protect society from him. That said juvenile has received the services of the Division of Youth Services and continues to involve himself in other violations of the law and is therefore beyond the rehabilitative care, treatment, and services available to the Court. The said juvenile is an experienced person, and mature in his appearance and habits to the extent that the juvenile forum and rehabilitative machinery are not adequate for his treatment and confinement. The present juvenile system of rehabilitation and confinement lacks sufficient security to deal with a perpetrator who constitutes a threat to society and there are no adequate rehabilitative facilities available to the Juvenile Court should jurisdiction of the above-named juvenile be retained by the Court.

The Court has received into evidence, Exhibit number nine, which is the statement of Heath Allen Wilkins and which the Court finds to have been coherently and voluntarily given after all necessary and appropriate advice

was given concerning the juvenile's legal and Constitutional rights. The Court finds, however, that concerning the relevant issues regarding dismissal of the petition herein to allow prosecution under the general law, there is other substantial and compelling evidence, which causes the Court to sustain the Juvenile Officer's motion. The Court grants leave for the withdrawal of Exhibit nine and the substitution of Exhibit nine A, a duplicate in its place.

WHEREFORE, it is ordered that the petition filed in this cause be and the same is hereby dismissed, and that the juvenile may be prosecuted under the general law for the offenses alleged in said petition.

/s/ [Illegible]  
Judge of the Juvenile Court

STATE OF MISSOURI  
DEPARTMENT OF MENTAL HEALTH

WESTERN MISSOURI MENTAL HEALTH CENTER  
Division of Comprehensive Psychiatric Services  
Kansas City, Missouri 64108

December 16, 1985

*REPORT OF MENTAL EXAMINATION:*

Re: Heath A. Wilkins

Date of Birth: 1/7/69

SSN# 492-66-2262

Circuit Court Case# CR185-490FX, CR185-491FX and  
CR185-492FX

Western Missouri Mental Health Center Chart #70668-2

Date of Examination: 11/27/85

*SOURCE OF INFORMATION:*

The information obtained for this report comes from:

1. Referral data from the Seventh Judicial Circuit Court, Clay County, Missouri.
2. Clay County Sheriff's Department Investigation Report and related reports (#85-2311) pertaining to the alleged offenses.
3. Evaluation and treatment records from: Crittenton Center, Kansas City, Missouri; Tri-County Community Mental Health Center, North Kansas City, Missouri; Butterfield Youth Services, Inc., Marshall, Missouri; and, Western Missouri Mental Health Center, Kansas City, Missouri.
4. Evaluation and Progress Reports from the State of Missouri, Division of Family Services and the Clay County, Missouri Juvenile Court.



5. Psychiatric Social Work Report completed at Western Missouri Mental Health Center specifically for this evaluation.
6. Personal interview, mental status examination and psychological assessment of the defendant conducted on the date listed above.

#### *IDENTIFYING INFORMATION:*

The defendant, Heath A. Wilkins, is a 16 year old, Caucasian male referred to Western Missouri Mental Health Center for a mental examination pursuant to the provisions of Chapter 552, R.S.Mo., by the Honorable Glennon E. McFarland, Judge of the Circuit Court of Clay County, Missouri, Division 1. The defendant is charged with Murder—1st Degree, Armed Criminal Action, and Unlawful Use of a Weapon.

According to the information contained in Police Investigations files, the defendant is alleged to have fatally stabbed a female storekeeper of a retail liquor/delicatessen shop during an apparent robbery. The incident reportedly occurred during the late evening hours of 7/27/85, in the vicinity of 2600 Block of North Bell, Avondale, Missouri. The defendant was apprehended apparently without incident on 8/10/85. The defendant was certified as an adult subsequent to Chapter 211., R.S.Mo., on 8/15/85 by order of the Juvenile Court of Clay County, Missouri.

#### *RELEVANT HISTORY:*

The defendant was born 1/7/69 in Little Rock, Arkansas and is the second of two siblings. He was reared primarily by his mother and other family members until approximately age 10. At that time he began a series of ongoing placements outside of the parental home, which consisted of residential facilities and correctional centers under the supervision of The Juvenile Court.

Adjustment was apparently marginal and his behavior within these settings is generally characterized by both behavioral and academic difficulties. Psychiatric/psychological diagnoses are consistently reported as "Personality" and "Conduct" Disorders, the essential features of which include repetitive patterns of "undersocialized" and "antisocial" behavior. Evaluation/treatment records list no psychotic, organic or cognitive/intellectual impairments. The defendant presents no current major medical/physical concerns and is on no program of prescribed medication. There is no history of major illness, injury, medical-surgical difficulties, allergy, seizure disorder or traumatic head injury. The defendant reports a significant history of alcohol/illicit drug use beginning in early adolescence. Although he admits to abuse of a variety of substances, he reports preferential (and fairly regular) use of psychedelics and hallucinogens, primarily marijuana and LSD.

#### *EXAMINATION AND MENTAL STATUS:*

The defendant presented as an adequately developed and nourished, Caucasian male who appeared approximately his stated age. No gross physical abnormalities or disturbance in motor activity were noted and he appeared to be in no acute physical or emotional distress. Level of hygiene/grooming was appropriate. The defendant's overall manner of presentation and general interview behavior may best be described as alert and cooperative. He spoke freely, answering all questions appropriately, and a rapport adequate for the purposes of this examination was easily established.

Throughout the examination interview, the defendant was logical and coherent and there were no signs of cognitive disorganization or loss of reality contact. He experienced no difficulty engaging in normal conversation, comprehending and responding to direct questions/instructions, or engaging in the interview process. The defendant was fully oriented to time, place and person and aware of his

situation and surroundings. Thought processes were well organized/focused and thought content was goal directed and reality based. There was no evidence of distractibility, tangentiality, cognitive delay or idiosyncratic behavior. No hallucinations, delusions or other florid psychotic symptoms were elicited. The defendant himself denies having any such experiences either presently or at anytime in the past other than those associated with drug (i.e. hallucinogen) usage.

Within the examination interview, the defendant exhibited an appropriate range and intensity of affective responses. He interacted in a relaxed and spontaneous fashion and mood, facial features and physical gestures were congruent with the presented topic of conversation. There were no indications of suicidal ideation aggressive preoccupation or uncontrolled/unmanageable behavior and nothing to suggest the presence of major affective disturbance. The defendant was appropriately serious when discussing his current legal situation but showed no overt signs of anxiety of dysphoria over the possibility of criminal incarceration.

Results of formal personality assessment, utilized in the Minnesota Multiphasic Personality Inventory (MMPI), were generally consistent with the defendant's mental status, clinical presentation and reported history. Individuals who produce similar MMPI profile patterns tend to be somewhat defensive and non-conforming and frequently present a history of underachievement, marginal adjustment and drug related difficulties (particularly involving hallucinogens).

The defendant's overall level of intellectual functioning is judged to be within the average range. Attention/vigilance, memory for both recent and remote events, and the ability to encode new information were without deficit. The defendant was verbally fluent and demonstrated well developed verbal/communication skills. He experienced no difficulty comprehending and responding to complex verbal interactions or expressing

himself in a logical, coherent and intelligible fashion. He possesses fully functional literacy skills and demonstrated appropriate comprehension of moderately complex printed material. Basic arithmetic skills were similarly adequately developed. Higher order processes appeared to be within the approximate normal range and with no specific deficit. Judgement, reasoning, problem solving strategy and sense of responsibility were, by clinical test, without deficiency. Pertaining specifically to his current situation the defendant was able to present and discuss his legal status, as well as the events and circumstances surrounding his arrest, in a logical and intelligible fashion.

In summary, the results of this examination indicate that the defendant is an individual of average intellectual capacity who demonstrates no gross deficits in terms of his overall mental status and no symptoms of mental disease or defect within the meaning of Chapter 552, R.S.Mo.

#### *COMPETENCY TO STAND TRIAL:*

The defendant is aware of his situation with the Court and possesses a functional understanding of the nature, object and participants of criminal court proceedings. He is aware of the charges as they are brought against him and the nature and range of possible penalties which may be involved should he be found guilty.

The defendant reports being familiar and comfortable with his appointed attorney whom he identified as Mr. Fred "Duchardt." He should be able to establish and maintain an appropriate relationship with legal counsel, as he was able to do so with this examiner. Based on the results of the current mental status examination, there is nothing to suggest that the defendant would experience difficulty attending to, and participating in court procedures, understanding basic legal rights, decisions and options, interpreting witnesses' testimony, or testifying



in his own behalf. There are no clinical indications to suggest that the defendant would be likely to decompensate during trial proceedings or while awaiting to stand trial. He appears fairly well adjusted in his present setting and does not report or demonstrate any notable symptoms of psychotic or affective disturbance or other similar conditions.

In summary, it is the opinion of the examiner that the defendant at the present time possesses sufficient capacity to understand the proceedings against him, meaningfully assist legal counsel, and cooperate with the Court in his own best interest.

#### *RESPONSIBILITY AT THE TIME OF THE ALLEGED OFFENSE:*

The defendant admitted his involvement in the alleged criminal offense. His account of the incident as presented to this examiner was essentially similar to the information contained in police investigation files. Memory appears intact for the time period surrounding the alleged offense and the defendant was able to offer a detailed, logical and coherent account of his behavior at that time. He reports having experienced no unusual thoughts, feelings or compulsions and indicated that he was functioning under no particular stress/pressure or duress.

The defendant did admit to moderately heavy recreational use of both alcohol and a variety of illicit drugs (primarily hallucinogens) throughout the time period surrounding the alleged offense. He reported frequent use of marijuana and "acid" (i.e. LSD, a synthetic psychedelic/hallucinogen). Although the defendant indicated that he was "high" at the time of the alleged offense, subsequent to ingesting LSD approximately "four hours before", he did not report having experienced any distortions, hallucinations or other perceptual changes, or any confusion or similar intellectual/cognitive impair-

ments at the time of the alleged offense. Based on the defendant's subjective report, he had performed/participated in a variety of intentional and goal directed activities throughout the time period in question. In addition, the information contained police investigation files (including statements from the defendant himself, and associates/friends and others who had been with the defendant throughout the time period in question) offers no indication of any grossly disorganized, bizarre or uncontrolled/unmanageable behavior on the part of the defendant/suspect at any time surrounding the alleged offense.

Based on the information collected in the course of this examination, it is the opinion of the examiner, that at the time of the alleged criminal conduct the defendant was not suffering from mental disease or defect within the meaning of Chapter 552, R.S.Mo. There is nothing to suggest that the defendant would have been incapable of: a) goal directed, purposeful behavior; b) knowledge and appreciation of the nature, quality or wrongfulness of such alleged criminal actions or; c) the capacity to conform his conduct to the requirements of the law.

#### *RESPONSE TO COURT ORDERED ITEMS:*

As requested by the Court Order, the following is offered:

1. In the opinion of the examiner, the accused does not suffer from mental disease or defect by which he lacks the capacity to understand the proceedings against him or assist in his own defense.
2. It is not recommended that the accused should be held in custody in a suitable hospital facility for treatment pending determination by the Court of the issue of mental fitness to proceed.
3. It is not recommended that the accused, if found by the Court mentally fit to proceed, should be detained in such hospital facility pending further proceedings.



4. In the opinion of the examiner, the accused does not suffer from mental disease or defect within the meaning of Chapter 552, R.S.Mo.
5. In the opinion of the examiner, at the time of the alleged criminal conduct the accused did not suffer from mental disease or defect within the meaning of Chapter 552, R.S.Mo., which would have rendered him incapable of knowing or appreciating the nature, quality or wrongfulness of his conduct or would have rendered him incapable of conforming his conduct to the requirements of the law.

Respectfully Submitted,

/s/ Steven A. Mandracchia, Ph.D.  
 STEVEN A. MANDRACCHIA, Ph.D.  
 Department of Forensic Psychiatry  
 Western Missouri  
 Mental Health Center

SAM/bm

THE MENNINGER CLINIC  
 TOPEKA KANSAS

Psychological Test Report

Patient's Name WILKINS, Heath Age 17  
 Reg. No. 0-132811  
 Examiner Melvin Berg, Ph.D./cr  
 Date 4/8/86

TESTS ADMINISTERED:

WAIS-R, Animal Choice Test, TAT, and Rorschach

INTRODUCTION:

This young man was accused of murder in the course of a robbery to which he is planning to plead guilty. He has puzzled his attorney with his disinterest in defending himself and his readiness to accept the death penalty. The patient's alleged involvement in this crime appears to be the end result of a long history of serious anti-social maladjustment throughout his childhood which resulted in a series of placements in psychiatric settings due to his incorrigibility and threats of violence at home.

This testing is part of an evaluation requested by the defendant's attorney who has been concerned and puzzled by the defendant's disinterest in mounting a legal defense as well as his acceptance of a possible death penalty. Moreover, the patient has given evidence of rather morbid preoccupations regarding death expressed in poems which have come into the attorney's hands. This passivity in the face of a possible death penalty, along with his morbid preoccupations, has caused the attorney to wonder about possible mitigating psychological circumstances which may

have contributed toward the alleged criminal act and may also have bearing upon his competency to stand trial. This testing aims at clarifying the nature of the defendant's psychological functioning, the extent of disorganization to which he may be vulnerable, and psychological factors which could have contributed to the defendant's alleged criminal act and his attitude toward the charges against him.

#### INTELLECTUAL FUNCTIONING:

The patient is functioning within the Average Range of Intelligence (Verbal IQ, 95; Performance IQ, 124; Full Scale IQ, 105) and shows a pattern of abilities and deficits suggestive of an impulsive cognitive style which avoids careful reflection in favor of immediate action. First, he demonstrates a disinterest or inability to sustain logical and stepwise problem-solving efforts in situations calling for careful and deliberative thought. As though he refuses to summon the required energy, he in a cavalier manner devalues the constrictions of well considered reasoning. His thinking impulsively darts toward glib and facile solutions as he avoids channeling effort into a deliberative or process systematic thought. This capricious and haphazard approach is exemplified by his attempted solution of an arithmetic problem during which he simply chose to guess and estimate rather than work out the problem mathematically, explaining, "I don't know (how I arrived at the answer). I just picked a number. I estimated it. . . . *I don't figure it. I just know it. I figure on paper and know in my head.*" At other times he resorts to a most arbitrary basis for problem solution, that is the association of ideas on the basis of rhyme. So when asked to explain Marie Curie's achievement he said "for inventing Mercury" or define plagiarize he explained "the act of getting pleasure."

His readiness to leap toward impulsive easy solutions is also demonstrated in the quality of his judgment con-

cerning more complex and ambiguous problems regarding social mores and the manner in which people typically manage and conform to the customs of our society. His ability to apply common sense is moderately impaired as a result of his failure to exercise a more searching and well considered method. Thus, he becomes prone to hasty judgements, based upon a global and vague attempt to understand the world around him. For example, in response to a question regarding why people should pay taxes he said, "for the government. (Say more) I'd just say the economy." This cognitive approach to problems and style of understanding the environment reflects an inaccurate, vague, and mildly distorted understanding of social conventions and the rationale for how and why social mores and customs are established.

In addition, this impulsive style of thought also contributes a concrete focus upon the superficial aspects of a situation or an idea since he is simply not accustomed to adopting a deliberative cognitive analysis. It is likely that higher levels of abstraction and integration are not beyond his intellectual potential but are obstructed by his impulsive proclivities which simply chose to bypass a more sustained meticulous approach. The judgemental difficulties described here are not of sufficient magnitude as to interfere with his ability to comply with and contribute toward his legal defense nor can they be construed as a psychotic inability to fail to distinguish between right and wrong or fact and fantasy.

#### THE CAPACITY FOR ORGANIZED THOUGHT AND ATTUNEMENT TO REALITY:

This young man's arbitrary and impulsive style of thinking can take on more serious implications as the problems he is confronted with become less routine and structured and require greater internal efforts to be able to organize thought and language in a logical manner without reliance upon external guidelines. This is the kind of think-



ing called on to guide people in managing interpersonal relations, making major life choices, or perform under the sway of intense feelings. Here his thinking too readily drifts toward an abandonment of rules and language and logic as though he believes that he can at whim flout these conventions. For example, at times he uses words and phrases in an odd and idiosyncratic manner as when he described a slender individual as being "demusclar" or referred to Martin Luther King as a "freedom mover," meaning a "freedom fighter." His sporadic use of words which he coins himself is indicative of a vulnerability to entertain personalized ideas which are out of tune with reality when the guidelines for understanding reality are not clearly apparent.

Moreover, his thinking can become muddled and fluid as he too swiftly moves from one idea to another and attempts to combine them in a manner which winds up as a hodge podge of odd notions and beliefs. Particularly when stirred by feelings, his thinking becomes temporarily disorganized and permeated by highly personalized fantasies which temporarily push him toward the outer limits of what is commonly accepted as reality and good sense. When depressive or angry affects are aroused, his thinking deteriorates, becomes diffuse, and so dominated by feeling that his thoughts then function more as a form of emotional discharge than as a rational means of understanding reality and coming to grips with problems.

Thus, when asked to tell a story about a picture of a man who is standing in a cemetery he said,

"It's dry . . . its like its barren. Its like it's crowded and goes on forever . . . There is no need of anything like for water . . . you get thirsty but you don't dry out . . . There's no light but you don't need to see anything because you know where everything is at . . . He's not dead because he was never

alive. I guess it would feel or represent waiting . . . for nothing. It's not waiting for nothing . . . An example would be you can't see a shadow, you can only see the absence of . . . it's a real gruesome picture."

Under the sway of intense feelings, such as the depressive sense of emptiness and isolation exemplified above, his thinking becomes subject to illogical reasoning, and his ties to reality are strained by odd ideas and perceptions of the environment and people which are vulnerable to distortion. At such times, the examiner speculates that he and the environment take on a quality of being strange, unreal, and redolent with peculiar and uncanny feelings like that which most people experience only in nightmares.

#### *HOW FEELINGS ARE MANAGED:*

This young man is typically able to present himself, and indeed experience himself, as being as cool as a cucumber, so that during the testing, as has apparently been the case in other clinical interviews, he is able to comply, cooperate, and readily adjust to the demands of the situation. This calm exterior, however, is only a minor and superficial aspect of his functioning in that he has learned to deny, and minimize feelings in order to keep their disturbing impact at a safe distance. He is typically unaware of and out of tune with emotional stirrings which rumble within him and then find a sudden, intense, and eruptive discharge sweeping him along like a feather in a hurricane. Despite his efforts to keep himself free of feelings, his defenses readily fall, as he is easily overwhelmed by intense affects which are confusing to him, resist his efforts at understanding and verbalization and take on an uncontrollable force. Subsequently, he can be consumed by a deadening depression which leaves him feeling thoroughly hopeless in a world which seems devoid of life or meaning. More ominously, anger can reach



explosive intensity and seek discharge through sudden spasms of destructive action as suggested by his inkblot images of exploding objects such as a missile, volcano, or an oil tanker. It is likely that his rage and morbid despair combine, shade into, and trigger each other, and when overcome by these feelings, his thinking is immobilized and a pawn of his uncontrolled affects. Subsequently, it is difficult for him to tolerate affect, whether it be anxiety, depression, or anger, as his ability to modulate feelings suddenly evaporates. His chilly and blank denial of feeling is thus a precarious defense against such losses of emotional control.

#### *HOW HE EXPERIENCES HIMSELF AND OTHER PEOPLE:*

This young man has over the years become practiced at experiencing himself as free of feelings, and as a result winds up feeling "bored" and empty. He is cautious about allowing other people to know him and subsequently is apt to be suspicious when they try to peer beyond his evasions, for he has little trust in others from whom he expects primarily indifference or destructive attack. His attitude toward others is frequently that of icy indifference or omnipotent rage and protest that he must in anyway compromise or suffer frustration as a result of their own needs. He aspires to be thoroughly free and unfettered by any constraint or limits upon his whim. This attitude leads him to reject and resent authority. Despite his rage and rejection of social obligation and ties to others, he demonstrates an incipient potential for attachment and concern which leaves him vulnerable to feelings of loss and longing.

It may be this small seed of interest and attachment to others which gives rise to his underlying sense of badness which is exemplified by a story he told about a man who painted a picture and did not like the finished product as he "realized this is ugly, this is helpless. It didn't do

anygood. So, he threw it away, threw it in the trash." In another revealing story he told of a man who was hypnotized, tells secrets about himself during the hypnosis, and subsequently loses the friendship of the hypnotist who is repelled by what he learns about the true nature of his friend.

His depression derives primarily from a sense of utter isolation and aloneness that causes him to feel as though he were living in a world barren of life to the extent that he is unsure of his own aliveness and reality. His fantasy life is haunted by images of death, shadows and preoccupations with emptiness. Like somebody who has barely learned to become attached to anything or anybody, others are experienced as mere shadows who are unreal and not quite alive. The environment is devoid of anything to which he could warm up to and feel the rewards of a relationship. He is left with an excruciating sense of emptiness, deadness, and longing for *something* to fill up the barren place in his life, although he does not know what that might be. Just as he has tried to deny his rage, he likewise tries to seal off this depressive experience which intermittently breaks through his defenses and is expressed in poetry or profoundly disturbing emotional states leading him to dwell on death and morbid themes.

Obviously, this young man is exquisitely vulnerable as he tries to contain rage, and feelings of complete isolation. In order to alleviate his anguish and alienation, he is likely to turn toward gratifications which provide temporary relief from despair. Thus, he is apt to take pleasure by indulging himself in stimulating activities and thrill inducing sensations which provide immediate gratification and distraction from the torment of his inner world. When these indulgences fail death may loom as a welcome escape and perhaps an insignificant loss since he feels not quite alive.

### DIAGNOSTIC UNDERSTANDING AND SUMMARY:

The psychological picture of this youngster is most consistent with that of Conduct Disorder, Undersocialized and Aggressive Type. His capacity to manage and control affect is tenuous and inconsistent, leaving him a subject to impulsive actions as well as arbitrary and capricious thinking which is prone to skirt over details, and considerations for logical systematic thought. He is intolerant of intense affects such as anxiety, depression, or anger, in that such feelings are overwhelming, interfere with his ability to think clearly, and gives rise to impulsive action. He is vulnerable to massive infusions of intense rage which lead to spasms of destructive action. His rage co-mingles with a profound depressive experience generated by an excruciating sense of lonely alienation whereby he experiences both himself and other people as being lifeless and empty. He then becomes swamped by morbid concerns regarding death which outstrip his ability to think clearly as he is gripped by disturbing mixtures of rage, depression, and aloneness temporarily straining his ability to think clearly and judge reality accurately.

He barely experiences ties to others or emphatic attunement as though he has experienced few occasions when he felt intimately involved with another person whose being he could understand, and value. His notion of himself in relation to others is that of a shadow living amongst shadows whereby his inner life and that of others is felt as insubstantial except for anguish and anger. He protects himself from this morbid and confusing inner world by attempting to deny and minimize his feelings which nevertheless squeeze through in the form of surges of intense feeling states which can give way to impulsive behavior. These defensive efforts to wash out his feelings leave him feeling bored and disconnected from his environment, which then gives rise to his restless search for excitement, pleasure and omnipotent domination of the environment.

### LEGAL IMPLICATIONS:

Despite the massive impairments in this youngster's developments which have contributed toward his inadequate impulse controls, vulnerability to muddled though, intense rage, and experience of others as not being real, he cannot be regarded as suffering from a psychotic condition which grossly impairs his attunement with reality. Certainly it is possible that in the heat of intense feeling states his capacity to think clearly, control his impulses, and evaluate reality can become temporarily weakened.

With regard to his ability to aid in his own defense, he possess adequate cognitive skills to be able to collaborate with an attorney and understand the legal circumstances facing him. His reported disinterest in waging a legal defense may result from his hopeless view of his life which already feels barren and worthless, so the prospect of living in prison without the stimuli to distract him from his inner torment may seem unbearable.

### TREATMENT IMPLICATIONS:

It is difficult to assess this young man's treatability for even though he exhibits an extreme indifference and alienation from others which limits the extent to which he can be influenced, he harbors incipient longings to establish human contact. It is possible that over the course of a long period of time, he could benefit from an *intensive treatment* process which was conducted in a *highly secure* setting by highly skilled and committed personnel. The primary goal might be to provide a milieu within which he could develop a relationship to another person to whom he could become attached with the aim of cultivating his potential for valuing other people and experiencing concern. The availability of another human being who would become an object of his suspicion, longing, rage, and hopefully guilt could alleviate his sense of isolation and help him integrate his destructive rage with his longing for involvement with others. A potential



treatment risk for him is that of suicide, for should he become more aware of his depressive hopelessness and loneliness, without establishing a supportive bond to a treater, his despair may become unbearable.

His writing and poetry may be a potential medium of communication with treaters, for it appears that he has attempted to use writing as a means of trying to understand his confused inner experience. In addition, his poetry represents a creative act which is offered to others, perhaps as a form of reparation for his sense of badness, and offered in a last vestige of hope that somebody will take the trouble to listen and have the concern to hear what he is trying to say. His poetry seems to be analogous to the current program of telecasting radio messages into outer space in the hope, against all odds, that a distant being will hear, and understand the message. However, given the extent of his alienation, and devaluation of people it remains an open question whether he can allow himself to develop attachments to those who might try to listen.

/s/ Melvin Berg, Ph.D.  
MELVIN BERG, PH.D.

Date Signed: 4/9/86

THE MENNINGER FOUNDATION  
Diagnostic interview report

Patient's name WILKINS, Heath Reg.# 132 811 Age 17

Name of person(s) interviewed patient  
(Specify relationship to patient)

Referred by Frederick Duchardt, Attorney

Dates seen March 20, 1986

Interviewer William Logan, M.D./gm

Team members Melvin Berg, Ph.D.

Problems and issues Diagnosis and evaluation of competency and criminal responsibility

Diagnosis

Principal  
diagnosis  
(check one)

Axis I	312.00	Conduct Disorder, undersocialized	<input checked="" type="checkbox"/>
	305.31	Hallucinogen Abuse Aggressive	<input type="checkbox"/>
	305.21	Cannibus Abuse	<input type="checkbox"/>

Axis II	301.83	Borderline Personality Disorder	<input type="checkbox"/>
	301.22	Schizotypal Personality Disorder	<input type="checkbox"/>

Axis III

Current medications

Physical exam (is) (is not) required at this time.

Axis IV

Axis V



Recommendations and initial treatment plan upon completion of diagnostic study:

	TMF	Elsewhere
Intensive outpatient evaluation	<input type="checkbox"/>	<input type="checkbox"/>
Inpatient treatment	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Day hospital treatment	<input type="checkbox"/>	<input type="checkbox"/>
Psychoanalysis	<input type="checkbox"/>	<input type="checkbox"/>
Individual psychotherapy	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Group psychotherapy	<input type="checkbox"/>	<input type="checkbox"/>
Family therapy	<input type="checkbox"/>	<input type="checkbox"/>
Psychological testing	<input type="checkbox"/>	<input type="checkbox"/>
Marital therapy	<input type="checkbox"/>	<input type="checkbox"/>
Counseling	<input type="checkbox"/>	<input type="checkbox"/>
Casework	<input type="checkbox"/>	<input type="checkbox"/>
Extended consult	<input type="checkbox"/>	<input type="checkbox"/>
Brief psychotherapy	<input type="checkbox"/>	<input type="checkbox"/>
Pharmacotherapy	<input type="checkbox"/>	<input type="checkbox"/>
Other (specify)	<input type="checkbox"/>	<input type="checkbox"/>

Estimated time frame for treatment 3 years plus

Additional data (Use second page)

## INTRODUCTION

The patient is a 17-year-old (d.o.b. 1/7/69), Caucasian student who is charged with first-degree murder, armed criminal action, and unlawful use of weapon in the Circuit Court of Clay County, Missouri. The incident occurred during the late evening hours of 7/27/85 when a female clerk of a liquor-delicatessen shop was fatally stabbed during the course of a robbery. The patient was referred for psychiatric evaluation by his attorney, Fred Duchardt, of the Clay County Public Defender's office. The referral question concerned the patient's mental state at the time of the offense.

## DESCRIPTION OF EVALUATION

The patient was interviewed for 5 hours on 3/20/86 in the Clay County Adult Detention Facility. The evaluation focused on the patient's past history, current mental state, and state of mind at the time of the offense. Psychological testing including the WAIS-R, animal choice test, TAT, and Rorschach were administered on 3/22/86 by Melvin Berg., Ph.D., a clinical psychologist.

Background material available for review included the following:

1. Evaluation of the Tri-County Mental Health Center and Western Missouri Mental Health Center during August and September 1979.
2. Records from the Butterfield Youth Services including the admissions summary, reports to the juvenile court, treatment reviews, progress reports, psychological testing, school records, psychiatric evaluations, and discharge summary covering the period from 2/1/80 until 5/20/83.
3. Reports from the Crittenton Center in Kansas City, Missouri, including the discharge summary, psychiatric evaluation, psychological testing, and school records covering a period from 5/28/83 until 11/17/83.

4. The psychiatric evaluation of the Western Missouri Mental Health Center dated 12/16/85.
5. The investigation reports on the current offense.

### *PAST HISTORY*

The patient is the younger of two sons born in an intact home in Little Rock, Arkansas. The patient does not remember his father as his parents divorced when he was approximately age 4. His mother worked in a beauty salon and following the divorce took her two sons to live in Liberty, Mo., where the patient participated in a head-start program at age 5. At age 6, the family relocated to Kansas City where he attended Gracemore Grade School. The patient related he was good in his studies and passed all of his courses without doing any work except for the tests. He reported, "I have a hard time with the grind." He admitted he often fought with other students and even organized fights with bunches of people. He indicated he learned about peer pressure when he was little and although he was not popular he had friends. He reported he was shy.

When asked about his parents' divorce, the patient reported, "I grew up with my mother's story." Primarily this was that the father left her and never contacted the family to help them. Consequently the family was poor.

The patient stated his mother was mean if he did something wrong. Often during his childhood he would stay away from the house with friends. When he returned, his mother would beat him and put him in a room. He claimed this stopped his behavior for a short time but he soon ran away again. He believed he was his mother's favorite but took the blame for everything. Often he claimed his mother's beatings would last for up to 2 hours. He had no contact with his father. By age 7 he was robbing houses primarily for knives and money. He reported that he loved fires and would often go to the

woods to build them. At age 8 he reported he tried to burn down houses and on one occasion a whole apartment complex. He would do this by tacking a cloth to the ceiling, lighting it and running. The patient's mother worked at night and slept during the day. A neighbor baby-sat during the day but the children were left alone at night. The baby-sitter smoked pot and often had friends over. His mother would often question him about the baby-sitter's behavior. At age 9, the patient, his brother, and one other child ran away to a nearby barn. His mother became concerned and contacted the police, who searched for him with a helicopter. He was not arrested at this point but merely sent back home with his mother.

The patient's closest relationship seemed to be his maternal uncle with whom he would stay during the summer. Often his mother, her boyfriend, and his brother would visit the uncle. The patient reported he had been stoned with his uncle since kindergarten. He claimed his mother and uncle joked about this. He claimed the uncle taught him how to shoot guns and owned an AR-15 semi-automatic. The patient would often shoot at passenger cars for target practice.

The patient particularly did not like his mother's boyfriend who had a quick temper and would often slap him for small things such as walking in front of him while he was watching the TV. He recalled a plot to poison the mother so she would get sick and break up with the boyfriend. The plot concerned putting poison in Tylenol capsules. He stole the plant poison from a nearby nursery. He later sprinkled some of the poison on some ham which he fed to a neighborhood dog which died soon thereafter. The patient recalled being very angry and that he hated both his mother and the boyfriend. He never questioned what he was doing as "I never thought about any of my actions." Frequently during his youth he shoplifted and broke into people's houses. On several



occasions he was apprehended by the residents, but would tell them "I'm lost." He claimed they were gullible and it worked every time. He also poisoned different animals and pets around the block. On one occasion he stole \$5 in pennies, grabbed the dog that had been chasing him and forced the pennies in a bag down the dog's throat.

The patient recalled being evaluated at Tri-County Mental Health Center and Western Missouri Mental Center at approximately age 10. He estimated he stayed there 6 months but felt out of place as most of the children were older. He was then sent to Butterfield Youth Home. He was eventually put on East Ranch, a residential facility for 8 boys. He claimed the primary activity was doing farm chores. He missed 4th and 5th grades completely but passed the final examinations anyway and never made the grades up. At the youth home, the patient engaged in significant drug usage. He would grow his own pot and consume it. However he also abused inhalants, specifically including a substance he called "rush" which was a locker deodorant, and gasoline. He additionally stole LSD from another resident. This caused him to see colors, see things moving, and to hear his name called constantly. He denied consuming significant amounts of alcohol. On one occasion he drank rum straight but had to wash out the taste. He claimed the only drink he liked was gin and tonic. Because of his drug usage he was kicked out of the 8th grade and had then had a private tutor. He liked one counselor with whom he had therapy but it made little effect on his behavior.

The patient ran away from the youth home on many occasions but each time came back on his own. He additionally set fires. On one occasion he poured gasoline in the toilet, lit it, then flushed it. He was disciplined following the subsequent explosion. His favorite activity was to sneak out at night and sit on the roof, smoke

cigarettes, look at the stars, and talk to a friend. The patient had his first sexual encounter at age 13. However, he stated his mother's baby-sitter had also manipulated him sexually. He seemed angry that the teachers at Butterfield considered him dumb just because he did not know things. Frequently he would be placed in the "slow class" but could not stand the tedious explanations. When the patient became depressed he would dance with a net over his head. On one occasion he cut his wrist at Butterfield and claimed he had frequent thoughts of suicide. Prior to going to Butterfield he had jumped off a bridge but the car swerved before he was hit. He described in vivid detail he had imagined that the impact would break his legs, throw him over the hood, the windshield, and then onto the pavement. Other suicide attempts at Butterfield included an attempt to overdose with alcohol and drugs, and another time on antipsychotic medication, Mellaril, he had been prescribed. He claimed he was placed on Mellaril because he was "too active." The patient never participated in sports or other recreational activities with the other residents because he hated the heat. Instead, he would love to go out at night when it was dark and cool. In all, the patient stayed at Butterfield Youth Home for three and one-half years between the ages of 10 and 13½. After he finished the 8th grade he maintained he would not stay and was subsequently transferred to the Crittenton Center which was closer to his mother.

The patient recalled he was "kicked out" at Crittenton after 4-5 months. The court gave him permission to go home on probation. The only significant event during this period was the beginning of a steady relationship with a girl friend he met there. One reason he wanted to return home was that his mother never married her former boyfriend, Dave. Instead, she was now going with a boyfriend named George whom the patient described as "cool." After he returned home he would often



stay out all night and began drinking gin straight. He attended the 9th grade at Winatonka but would regularly become stoned before going to school. His brother was not at home at that point as he had been sent away for treatment. On at least one occasion he was busted for drugs at school. Eventually he began breaking into houses stealing money, jewelry, and knives. In addition, he would take guns, but usually lost the guns and knives. He would sell his wares to obtain money to spend at the arcade. On one occasion he ran away to southern California. He financed the trip by taking \$800. In New Mexico he stayed briefly with his former baby-sitter. In California he was introduced to speed. After he spent all of his money he called his mother to tell her where he was. His mother wired a ticket for him to return home.

Soon after his return, a friend was caught with a knife he had stolen from a house burglary. The patient was blamed and sent to the Detention Center in Mexico, Missouri. He seemed to enjoy this experience as the inmates were able to watch TV, play pool, and use the video machines. There was no school and the food was good. At age 15 he was sent to the Northwest Regional Youth Services in Kansas City. He made rapid progress through the Youth Services describing their rules as a "game." He continued, "mental health counselors are all the same, the mental machines of society." He gave illustrations of the jargon they would use and became adept at saying the right thing. At the Youth Services they tried to give him Thorazine which he refused because that was the medicine his brother always took. The only time he agreed to take the Thorazine is when he was stoned. However his marijuana usage did decrease at the Youth Center and he attended school regularly. The patient did not like this experience as there was no privacy. He did fairly well in school and claimed that he often taught others how to read and spell.

The patient was next placed in a foster home. He described that his foster parents were Christians who tried to convert him. He believed they were odd because the foster parents thought they could talk to God. The patient ran away from the foster home to live in the basement of the home of a friend who was a tree trimmer. The patient worked with his friend for 2 months. His probation was not violated as he offered to go to the Job Corps. However, the patient admitted he did so with the express purpose of getting the juvenile justice system off his back. He did go to Clearfield, Utah, but attended Job Corps for only a week before he quit. He then returned to the Kansas City area where he began living on his own. He had no further contact with juvenile probation officers from that point on.

Beginning in May 1985, he lived on the streets frequently sleeping in a statue of a large animal at Penguin Park. He began dating a young girl he had first met at the Northwest Regional Youth Service. Initially he actively looked for jobs using his mother's phone number. He since learned that some of the employers had tried to contact him but his mother had not relayed the calls. For a time the patient was involved in stealing material he subsequently sold to a fence for profit. Often he would stay several days with friends. He admitted becoming more heavily involved in drug and alcohol abuse. Particularly he liked to do acid, his favorite drug. He did not do cocaine as it was too expensive, and although he used crystal once intravenously he had made himself, he did not like it. He always carried a water gun that was filled with clorox and ammonia and had several knives in his possession. For a time he was also familiar with the use of num-chucks.

#### *PRESENT SITUATION*

The patient recalled the day of the offense he was "hanging around" at Antioch Mall and Arcade. With several

friends, he just walked from store-to-store as he had no place to go and "didn't care." He did not think about the future as he lived on a day-to-day basis. He would fence materials for money occasionally but on this day was out of money. He did not use narcotics as he did not want to become dependent on them or develop a habit. His girl friend had come to live with him at Penguin Park. He tried to have her go home but she always found him. He stated his girl friend always believed he would get into trouble but determined to stay with him as long as she could. On one occasion she obtained \$800 and asked him to leave. The two lived in a motel for a month. However the patient related it was not his money and he hated owing people anything or incurring obligations. The preceding month the patient had met several friends. One friend named Bo did not get along with his dad and came to live on the streets. As he did not know his way around, he frequently associated with the patient. Another associate was Bo's friend, "Shades." His girl friend, "Midget", came to live with him for two weeks before the incident. Under the influence of his girl friend for a time, the patient stopped using drugs with the exception of marijuana. The patient indicated that his girl friend had tried to dissuade him from performing the robbery which they had discussed at some point earlier. They were joined at Antioch Shopping Center by their friend, Shades, who had been fired from a cafeteria four weeks earlier but had just come there to pick up his check.

The patient had no idea why he decided to rob the delicatessen-liquor store that day. He claimed this was the first robbery he had done since he had been in Youth Services. He claimed he was not even shoplifting from the stores at the center. For some time prior to the incident, the patient recalled being quite tense. His girl friend had quit offering him money because he became very angry that she tried to press it on him. He recalled

he could not stand to be touched or forced to do anything. On occasion his friends would steal alcohol which they would drink together in the evenings. They often played a game where they would throw a knife at the other's feet. The patient also frequently used homemade LSD which he would call either red dragon or black dragon. The drug made trees look funny, made furniture move, and when he closed his eyes he could imagine anything. He was not able to sleep, eat, or even engage in sex with his girl friend. On occasion he could see the individual molecules of things and even see sound. The drug caused sound to be turned into liquid that would pour through into his head through his ears. That day he had done three hits of black dragon. He found he could write his name but would crack up laughing. He estimated he took his last hit of LSD around 7:30 to 8:00 in the evening. For dinner his friend Bo stole a pizza out of Show Biz, while another friend stole some liquor. By this time the patient recalled he was becoming violent. When Bo tried to talk to his girl friend, he became angry and threatened him with a butterfly knife and pushed him down. His friend Shades told him to cool down and took the knife away from him temporarily as they had a job to do that night.

Shades and his girl friend then walked to a nearby store to catch a taxi to north Kansas City hospital. The store they planned to rob, Linda's Liquors, was nearby. The patient related they had first planned to rob a different store but he changed his mind that day. He was unfamiliar with the woman who died but had met her once while living in the foster home. He recalled he usually went into that store at night because it was easy to shoplift cigarettes. He and Bo later joined the other two friends at the hospital. When questioned by a security guard they said they were there to visit a friend in the emergency room. It was planned that the patient and Bo would perform the actual robbery.



The two approached the liquor store through the woods so they would not be noticed around closing time when there would be few customers. They took with them a handbag containing a change of clothes and a towel. Prior to entering the store, they placed the handbag on a bench outside. They used the towel to wipe their feet so they would not make tracks when they entered the store. Both walked in and looked for food. The clerk was sitting on a stool behind the counter. The patient laid a \$5 bill on top of the deli and asked for a sandwich. This was to distract the attention of the clerk. His friend went to use the bathroom behind the counter where he put on gloves. When his friend came out of the bathroom he stepped behind the counter and grabbed the clerk. The patient then came around behind the counter and stabbed the clerk in the kidney. His friend then checked for any witnesses and briefly went outside to obtain the bag on the bench. The patient recalled that he stabbed the lady because she was there. He also wanted to stab her before she had a chance to look at him. The weapon he used was a butterfly knife. At the point he stabbed her he claimed he became a machine. He knew what to do to kill her and did not want to worry about any witnesses. He used the example that if a trash can was in the way, one had the choice of knocking it out of the way or walking around it. However if one walked around it, it would be in the way in the future. He recalled that he had told the police after his arrest he had stabbed her because she made fun of him. He maintained at that time he was trying to "play crazy" and pretend he "really freaked and lost it." However, he continued, "I've had enough of hospitals, I don't want to play crazy."

After he stabbed the woman she slumped to the ground. She did not struggle. She placed her hands over her eyes and rolled back on her side. Bo went to the cash register and asked which button to push. Bo had for-

gotten his gloves and therefore put his shirt over his hands so he would not leave prints. The patient instructed him how to take the case out of the cash register and to drop it in the bag. Bo then placed a number of packages of rolling papers in the bag and grabbed her lighter and cigarettes. He headed toward her purse but the patient instructed him not to take that. Bo then grabbed a bottle of liquor, peach schnopps, the girl friend had asked him to obtain. While looking over the liquor counter, Bo asked the clerk where to find something. The clerk was still conscious and told him. In less than a minute Bo had finished this and said he was ready to go.

The clerk began to cry and said, "Oh, no, don't kill me." The patient recalled saying, "Quiet." The clerk shut-up and "I killed her." He recalled he stabbed her several times, it caused no pain and came automatically.

Specifically, he stabbed her in the throat on 3 or 4 occasions and stabbed her in the heart. The patient described that it was almost "instant anger." He saw his actions as stupid but was "consumed." He realized his actions did not make sense and could think of no plausible reason for his action when questioned why it was necessary to kill the woman.

The patient recalled feeling "nothing at the time." Later, he read the woman had children and has regretted his actions.

Following the incident, he and Bo returned to the hospital where they met their two friends. The girl friend asked if everything was alright and he replied that everything went as it was supposed to. The two groups called two different taxi cabs and met at the bus station. The patient claimed that he had obtained approximately \$100. At the bus station they split the money. He and his girl friend received \$75 while Bo and Shades received \$25. He denied that he received \$800 as had been claimed was missing from the store by the owner. Fol-



lowing changing clothes and dividing the money, Bo and Shades left with the plan of later rendezvousing at a lake near Penguin Park. The patient and his girl friend remained at the bus station for an hour playing video games and drinking a coke. The patient and his girl friend met the other two at the lake approximately an hour later. He claimed that his friend Bo began to brag how the robbery had "gone down." The group eventually slept in the park that evening.

When the patient awoke the next morning he was angry that his girl friend had gone with Shades to obtain doughnuts. He stayed at the lake all that day and smoked marijuana but used no more acid. It was Sunday night before he realized what he had done. He wanted to be alone. He eventually spent the money he obtained on drugs. His girl friend tried to ask him about the robbery but he did not want to talk about it.

During the next week, he "figured" they would be caught when his friend Bo began bragging about the incident to friends. Although the girl-friend pressured him to leave he decided not to. He continued, "It didn't matter anymore, I didn't care." There was nowhere to run and he had no money. He decided just to get "wasted." He told his girl friend to go home and "stayed stoned."

The patient was arrested approximately two weeks later. They were at the lake at the time. He claimed when the cops came "I didn't give a shit." He merely told them what happened. He recalled he was told he had the right to remain silent that anything he said could be used against him and that he had the right to an attorney. While he was aware of this it seemed to matter little to him. All he said when he was arrested was "I love you" to his girl friend. He had thought about crying but was silent because he realized there was no one to help him. He realized at the time of his arrest he would probably never be able to hold his girl friend again. He felt it

was Bo's fault they had been arrested because he had bragged about the incident.

### *REVIEW OF PRIOR RECORDS*

Past records from the Tri-County Mental Health Center reflect he was referred by his mother under pressure from the juvenile court at age 10 in August 1979, when he and an older brother were apprehended in a burglary. The mother related a chronic history of lying and a 4-6 year history of stealing. He had run away from home at age 8 and again at age 9, on the first occasion damaging a trailer when on the second occasion being apprehended in a burglary of an apartment with 8 other children. Recently he had attempted to poison his mother by placing insecticide in Tylenol capsules and had hidden a knife under his mattress, bragging to his brother he was going to kill his mother and his boyfriend. The patient's academic performance was average and he had only minor behavior difficulties, generally relating well to other students.

The mother's history reflects she was raised by an alcoholic, unemployed father who was probably physically and sexually abusive. The mother dropped out of high school as she was pregnant but returned to finish her degree. She was married to the patient's father for 6 years but separated during the last 2 years at which time the family moved to Kansas City. The patient's father was a "daydreamer" who never followed through with anything. After the separation the father had no contact with the family. The mother was openly hostile toward her ex-husband who had provided no support but had recently contacted her and wanted the children.

The patient openly admitted his sadness and unhappiness related to not receiving any attention from his mother. He fantasized about a possible relationship with his father which did not exist. He explained his thefts were an

attempt to gain his mother's attention and to look cool to his friends. The mother had begun a relationship with a boyfriend who was living in the home. She was trying to provide her two boys with more monetary things in exchange for spending less time with them. The mother worked during the night shift during which time the two boys were left alone. The patient's brother also had psychological problems and had been referred for treatment.

Psychological testing at the time reflected a normal I.Q. in a young man who was anxious, tearful, and depressed. Testing reflected a rigidity in his responses and a tendency to react quickly and impulsively. He was characterized as being highly conflicted emotionally with high anxiety and inner turmoil. The conflicts were seen as stemming from the home environment. It was the patient's style to deny conflicts, alternatively withdrawing into depression or acting out his depression in an aggressive, psychopathic manner without consideration of the consequences and a minimum of remorse. The patient openly talked about suicidal thoughts and was felt to be at risk for suicidal or homicidal acts. The possibility of a thought disorder was considered because at times the patient's confusion approached paranoid ideation. The diagnosis was undersocialized aggressive reaction of childhood. Hospitalization was indicated to separate him from his home environment so that he could engage in intensive psychotherapy.

The patient was hospitalized at Western Missouri Mental Health Center from mid-August until 9/5/79. An additional evaluation confirmed the diagnosis of undersocialized aggressive reaction of childhood with depressive features. The recommendation was for long-term residential treatment.

The patient was admitted to Butterfield Youth Services in Marshall, Missouri, on 2/1/80. Additional history revealed the parents divorced in 1972 at which time the

patient's mother filed charges of physical abuse against her ex-husband and the ex-husband was committed for 6 months to the Arkansas Mental Health Center. The patient had become particularly disruptive during the last year frequently fighting with his brother, stealing money and jewelry from his mother, disobeying and lying. The patient did not want to return home because of the presence of a boyfriend in the home.

The patient's initial response was positive to the Youth Home and he seemed to adjust easily. He expressed no desire to return home and was enrolled in the 5th grade. He was noted to be a loner, did not like groups or athletic endeavors, and had difficulty with peers because of sarcastic cutting remarks. By the summer of 1980 he had visited with his mother and paternal uncle in Iowa and had begun to express more anger. He avoided discussion of his family situation. Although he did not do homework he made satisfactory grades. He complained of stress induced headaches and had difficulty concentrating on what he read or remembering visual or auditory materials. In early 1981 a hearing evaluation revealed no problems.

Educational testing done after his admission revealed unusual responses. In one example, when asked the reason we need policemen, he replied, "to get rid of people like me." He revealed plans to blow up a large building in Kansas City saying there was too large a population and the people would not be missed. Comments were made that he had a poor self-concept, poor attitude in school, was suspicious of authority, and lacked basic trust. He demanded much personal attention of the staff and was jealous of his peers. He reported having a vivid imagination and suspected he might be "crazy because of my thoughts." Occasionally he made bizarre derogatory sexual comments toward women prior to visits with his mother. The mother was described as passive and did not talk to the patient.



During the summer of 1981 the patient went with his family to visit his grandparents in Arkansas. His brother's mental health had deteriorated because of alcohol and marijuana use. At the Youth Home the patient had not been engaged in stealing but it was also noted he had no inhibitions against stealing. The patient also showed no motivation in school, did not participate in therapy, and was involved only sporadically with peers. Instead it was described that he sought excitement through drugs and hyperventilation. The comment was made that he needed the constant experience of excitement in order to feel alive from day-to-day. It was also described that he had little remorse and a "Swiss cheese conscience." It was felt he would not hesitate to be aggressive if he thought he could win. The patient, when interviewed, described that he like the buzz of drugs and had been sniffing gasoline, glue, pot, and using uppers and downers since the age of 6. He estimated he had sniffed gasoline 500 times in the past three summers and at least 10 times since his admission to the home. He also hyperventilated and passed out by fainting and chest squeezing.

For the last 6 months of 1981 there was no family contact. The patient was described as withdrawing into a fantasy life and was suspicious of adults and peers. On one occasion in September he put gasoline into a toilet and set fire to it causing an explosion. He slept through his classes, his grades dropped, and he seemed withdrawn.

By early 1982 his motivation had further decreased and he refused to do school work. He maintained he wanted to go home and became flippant and defiant. He stole a bottle of rum and drank it. He began to experiment with drugs and by June was discovered bringing marijuana to the Youth Home. In the summer of 1982 his 15-year-old brother was admitted to the Crittenton Center for drug and alcohol addiction and later diagnosed as suffering from schizophrenia. The mother admitted that she used marijuana and had it in the home. The patient

brought back marijuana obtained from the home. The patient was often noted to be fantasizing about outer space and supernatural powers. He was found on several occasions playing with fire. When interviewed he described prior to coming to the home he averaged stealing \$60 a day which he would spend in arcades.

In the fall of 1982 the patient enrolled in 8th grade. He was suspended for fighting with another student and engaged in strange, "bizarre" behavior to keep other students from getting close. He was noted to have a poor prognosis. When asked about the benefit of treatment the patient replied, "I was helped to come out of my shell, I learned more about drugs, and I'm older." Dr. Chapel, the psychiatrist, questioned his motivation and prescribed an antipsychotic agent, Mellaril, for a disoriented thinking pattern and high anxiety. At one point the patient was found pointing to "the iceberg in the field," while at other times his conversations did not make sense. The psychiatrist did not feel it was due to drugs but that the person might have a schizotypal personality or developing schizophrenia. The patient was described as aimless and began pressing to go home to get out of the program. At school he failed half of his subjects and received 6 disciplinary reports. He was "stoned" at school on a regular basis, engaged in "weird" behavior, and his adjustment was tenuous.

By early 1983, he decided to wait out the school year until he could go home. His drug usage was temporarily curtailed. The psychiatrist wrote, "It appears to me that Heath has been emotionally separated from the program for many months, possibly as far back as the day he entered the program. He seems to have made little progress in any area, except in occasional spurts of short duration." In retrospect, although the patient was engaged in recreational therapy, art therapy, group treatment, and individual counseling, he did not actually have the intensive psychotherapy that was initially recom-



mended. Instead, he was engaged in a behaviorally oriented program of activities. His family difficulties and animosity toward his mother were never discussed. His behavior, if anything, deteriorated. His initial diagnosis in January 1980 had been adjustment reaction of childhood which was less severe than the diagnosis given at Tri-County Mental Health Center. It was believed that the patient was mildly depressed and felt hopeless about the future. He expressed some benefit from the Mellaril stating it made him less anxious and easier to relate to people. For the spring semester of 1983 he was transferred to private tutoring from public school. He decided he would try and earn his way out of the Youth Home and would not bring drugs from home as he had been caught on three out of five occasions. It was eventually decided that he might be more motivated if placed near his mother in Kansas City.

At age 14, on 5/23/83, the patient was admitted to the Crittenton Center. His diagnosis was again conduct disorder, undersocialized, nonaggressive. He was transferred to gain some family involvements. His mood was described as distant, aloof, and depressed. There were no problems initially except for "bizarre" behavior attributed to attention seeking. He refused medication. After he was told his discharge had been postponed he became indifferent and unavailable. When later told he would be discharged he began to work in the program and excelled. He particularly did well in sports and his school performance improved after they obtained a new computer. He was discharged on 11/17/83 to live with his mother and be followed weekly by a probation officer with drug screens. His final diagnosis was borderline personality and passive-aggressive personality.

Psychological testing at the center indicated isolated episodes of paranoid functioning. While he was described usually being hyperalert to his environment he was also prone to idiosyncratic interpretation of events. He was further described as having little appreciation of the

standards others used to guide their behavior. It was felt this could result in a violent release of energy with no internalized guilt. He had difficulty establishing an alliance with anyone. The psychologist stated, "There is explicit distrust of doctors and others who pose to help him, he perceives them, like himself as interested in accomplishing their own desires, and as likely as not to engage in deception and treachery to do so." The psychologist expressed a serious concern about violent, destructive, or self-destructive action.

The more recent evaluation at the Western Missouri Mental Health Center was significant for the patient's continued drug use of marijuana and LSD. He was described as having a fairly normal mental status where for the first time he expressed no aggressive preoccupation. He related that at the time of the offense he had ingested LSD approximately 4 hours preceding the event.

### *EXAMINATIONAL FINDINGS*

The patient is slender, immature appearing, young man who is neatly groomed. He relates in a casual, unconcerned manner, as if he does not care about the impact of his statements. He is not defensive. On the contrary, he reveals much information that most would attempt to conceal or modify, with little appreciation of its damaging effects, despite being aware of the purpose of the evaluation.

The patient's speech is well modulated, coherent, and goal directed. His surface emotional presentation is one of false bravado covering an apparent hopelessness about his past life and current situation. Yet he distances himself from his actions, describing them in a detached manner, as if he were observing his own behavior with puzzlement.

While there is no evidence of a disorder of perception or thinking in the form of hallucinations or delusions, he possesses little understanding of his actions which often seem to be an impulsive reaction to the emotional stimulus of anger and depression.

The patient is correctly oriented to his surroundings with a normal memory and attention span. Intellectual testing revealed a full scale intelligence quotient of 105 but are large discrepancy between a verbal IQ of 95 and a performance IQ of 124. This is suggestive of an impulsive cognitive style where action is favored over reflection. He typically focuses on the concrete aspects of a situation with only a vague understanding of the rationale for traditional social mores.

The patient has little trust in others, no ability to empathize, and no sense of connectiveness to other people. However, this can cause him to feel bored and empty. He is depressed, seeing himself as evil, isolated, and alone and often fantasizes about death. To counteract these feelings, he engages in frenetic activity which stimulates him and counteracts his own feeling of deadness. He wants to be totally free of constraints or the demands of others. Consequently, he not only rebels against authority but against any attempts by others to connect with him. These attempts are viewed as placing restrictions or obligations upon him for the benefits of others needs and not his own. He is additionally subject to attacks of anger, anxiety, and depression which he tolerates poorly. These disturbing emotions distort his thoughts to the point he engages in fantasies that serve as a way of discharging his emotions, rather than utilizing his cognitive skills to cope with problems. Typically he denies and minimizes feelings which leaves him empty and relentlessly searching for excitement. Occasionally there are mass attacks of rage which he discharges in destructive action.

## DIAGNOSTIC FORMULATION AND TREATMENT RECOMMENDATIONS

This adolescent is the product of an extremely chaotic home in which there was a lack of supervision and an open acceptance and even encouragement of drug usage on the part of parental figures. The presence of substance abuse and mental illness in the patient's only sibling also raises questions about a genetic component to the patient's chronic behavioral problems. In addition to a lack of supervision, there additionally seemed to be a lack of affection and nurturance in the home to the extent the patient has a profound developmental arrest. His ability to connect or to receive affection from others is lacking, as he views others as demanding or potentially exploitive.

This lack of human connectiveness leaves him feeling empty, alone, and vulnerable to the distressing emotions of anger, rage, anxiety, and depression. The patient's defenses against these emotions are brittle as he either denies his feelings or attempts to blot them out with alcohol or drugs. He has no experience and thus no ability in using his cognitive resources to modulate his emotional demands. When his defenses fail, his thinking becomes muddled and poorly organized with no conception of the rationale or consequences of his conduct. Unable to tolerate the demands of human relationships, the patient tries to alleviate his emptiness through relentless stimulation in the form of hallucinogenic drugs, thefts, or acts of danger in which he finds excitement. Ultimately, even this cannot produce lasting satisfaction and he explodes in fits of homicidal or suicidal rage generated by his hopelessness and frustration. This only serves to reinforce his innate sense of badness and further justify his isolation. In a sense he feels like an alien visitor and is preoccupied with death that at least offers some possibility of relief from an intolerable situation.



The treatment of this individual would be extremely difficult because of a developmental inability to connect with others. Treatment would have to be intensive, conducted by highly skilled committed personnel in a secure facility over a considerable period of time. Even under the best of circumstances his prognosis is guarded. Unfortunately this patient is unlikely to have greater access to such treatment in the future than he has had in the past.

#### *OBSERVATIONS REGARDING COMPETENCY TO STAND TRIAL*

The patient appears to have an accurate understanding of the charges against him, the potential penalty if convicted, possible pleas, and the role of the various officers and procedures of the court. Likewise he has sufficient memory and verbal ability to relate the details of his case to his attorney and assist him in preparing an adequate defense.

While the patient's cognitive capacity is intact, his actions in the case are governed more by his emotions. Prominent in this regard is his stated wish to die and determination to plead guilty to speedily effect this end. Since this is the case, he does not see his attorney as working in his own best interest. He is still insistent on a personal freedom, namely a freedom to die. He explains he fears torture more than death. He continues, death is no loss to him and that he prefers death to being locked up. He maintains he will not go to prison or a mental institution. He has thought of ending his life as he has "nothing to look out on." He believes he is a liability to his girl friend, his only connection, and his death would actually aid her in moving on with her own life. He labors under the assumption she is charged with a lesser crime and will receive a shorter penalty than himself. He expresses guilt at his own destructiveness and that he has hurt his girl friend, the victim, the victim's family, and his friends. He has only limited appreciation of the appeal

process or society's interest in his fate viewing this as only another intrusion and limitation of his own freedom.

In conclusion, while the patient has an adequate factual understanding of his situation and the ability to cooperate with his attorney, emotional issues may prevent him from acting in his own best interests. The weighing of these two factors, the cognitive versus the emotional, is the essence of the decision before the court.

#### *OBSERVATIONS CONCERNING THE PATIENT'S MENTAL STATUS AT THE TIME OF THE OFFENSE*

The patient described himself in the early summer of 1985 as being at a crossroads. He was on his own and free from the supervision of treaters, family, or the courts. He viewed his return to Kansas City as an opportunity for a new start and determined to go straight. However, devoid of skills or ability to modulate his emotions, he quickly fell vulnerable to frustration, despondency, and emptiness to which he responded resorting to the established pattern of impulsive thrill seeking, drug consumption and thefts.

The patient described that he is "scared when I go straight," stating there is "no security." Conversely, when he is "Pyzon", a nickname frequently applied to him, he is "confident," others "fear him" and he "runs the show."

The present offense is a carefully planned and executed crime, perpetrated with full awareness and realization of the illegality of the act. It also seems to be the rageful, impulsive enactment of a fantasized crime by one responding to his own hopelessness, rage, and frustration. Only after the act did the patient realize the full consequences of his behavior. He expressed less concern about the personal effect on himself, whom he already views as a lost cause, than upon the victim, the victim's



family, and his friends. When questioned about the wrongfulness of his actions, he stated, "shit yeah it was wrong. I don't understand, I've always done crimes by myself. This has hurt her (the victim), her children, Bo, Maggy, and Shades."

During the offense the patient seemed emotionally divorced from his actions, describing his reaction as mechanical, like a "machine." These actions seem less enacted out of passion than a total void of emotion.

In conclusion, the patient expressed fear of waiting more than dying, stating, "a wasted life is a dead life." His crime seems committed as much out of realization of the deadness of his own life as out of malevolence.

#### *OPINION REGARDING THE PATIENT'S MENTAL STATE AT THE TIME OF THE CRIME*

The patient suffers from a severe personality disorder characterized by enduring maladaptive patterns of perceiving, conceiving, and relating to his environment. Specifically this is manifest by his social isolation, suspiciousness of others, emotional aloofness, preoccupation with fantasies, impulsivity, drug usage, emotional liability with outbursts of rage, suicide attempts, and chronic feelings or emptiness characteristic of a borderline and schizotypal personality disorder. This condition has arisen from a conduct disorder undersocialized, aggressive type characterized by violence against persons and property and a lack of attachment to others which has existed since childhood. The patient also meets the criteria for hallucinogen, inhalant, and cannabis abuse.

While the current offense cannot be viewed entirely apart from the context of this patient's severe psychopathology, his recounting of his actions reveal they were carefully conceived and enacted in a deliberate manner with an awareness of their illegality manifest by numerous attempts to avoid detection. Therefore, although

this young man suffered from a mental disease at the time of the crime, he appeared to have the ability to appreciate the nature, quality, and wrongfulness of his conduct and the ability to conform his conduct to the requirements of the law.

This is not to say that the defendant did not suffer from significant impairment in his mental functioning as a result of mental disease which at the time of the crime hindered his emotional realization of the nature, quality, and wrongfulness of his conduct, and hindered his cognitive control of his behavior, but that his mental impairment does not appear to be to the extent that he would meet the legal criteria for insanity as defined under Chapter 552 RSMo.

/s/ William S. Logan, M.D.  
WILLIAM S. LOGAN, M.D.  
Date Signed 4-11-86

STATE OF MISSOURI  
DEPARTMENT OF MENTAL HEALTH  
DIVISION OF COMPREHENSIVE PSYCHIATRIC SERVICES  
MALCOLM BLISS MENTAL HEALTH CENTER  
St. Louis, Missouri 63104

December 29, 1986

The Honorable Andrew Higgins  
State of Missouri Supreme Court  
P.O. Box 150  
Jefferson City, Missouri 65102

RE: Heath A. Wilkins  
MB#: 064517/-  
Cause No. 68393

Your Honor:

I have completed the evaluation of Mr. Heath A. Wilkins, a 17 year old, single, Caucasian male who is currently confined at Missouri State Penitentiary in Jefferson City, Missouri, having been convicted of First Degree Murder, Armed Criminal Action, and Unlawful Use of a Weapon, Circuit Court Case Nos. CR185-490FX, CR185-491FX, and CR185-492FX in Clay County and sentenced to death on June 27, 1986.

The current evaluation was ordered by the Supreme Court of the state of Missouri to determine the competency to waive his rights to counsel.

During this evaluation, I interviewed Mr. Wilkins for three and a half hours at Missouri State Penitentiary and reviewed the following materials:

1) mental examination performed at Western Missouri Mental Health Center, dated December 16, 1985 by Dr. Steven Mandracchia.

2) psychological test report done at the Menninger Clinic in Topeka, Kansas by Dr. Melvin Berg, dated April 8, 1986.

3) a diagnostic interview report of Dr. William Logan, dated April 11, 1986.

4) an investigative report by the Board of Probation and Parole, state of Missouri, submitted by Mr. Steven Haynes, dated June 6, 1986.

5) a diagnostic report of the Classification Unit of the Department of Corrections written by Mr. Floyd George, CCW, dated July 8, 1986

6) transcript of the proceedings of the Supreme Court with appearances by Mr. Wilkins; Mr. John Morris, Assistant Attorney General; and Ms. Nancy McKerrow; and Ms. Janet Thompson, Assistant Public Defender (amicus curiae).

*SUMMARY OF BACKGROUND MATERIAL:*

*Offense:*

Mr. Wilkins, on 7/28/85, admittedly stabbed a female cashier at Linda's Liquor Store in North Bell, Kansas City. Mr. Wilkins who was a juvenile at that time made the statement in front of his mother and the Juvenile Officer, Ms. Joan Rumley, stating that he had taken a cab to North Kansas City Hospital where two of the codefendants stayed and Mr. Wilkins along with another codefendant went to Linda's Liquor to commit the crime. They watched people leave, then went inside to order a sandwich, at which time the codefendant asked to go to the bathroom. Mr. Wilkins continued indicating that he then asked for extra lettuce. The codefendant came out of the bathroom and grabbed the victim, at which time Mr. Wilkins admitted stabbing her where he thought her kidney was. He then continued stabbing her two or three times in the chest area and in the throat two or three times. Upon acquiring whether he knew they were going to kill the woman before they went to the liquor store, Mr. Wilkins reportedly answered affirmatively, indicating, "I told them there would be no witnesses."



Mr. Wilkins was subjected to competency examinations on 11/27/86 by Dr. Mandracchia; on 3/20/86 by Dr. Logan; and on 4/9/86 by Dr. Melvin Berg. Subsequently on April 16, 1986, a competency hearing was held and he was found competent to stand trial. A week later Mr. Wilkins was allowed to waive his right to counsel. On May 9, 1986 Mr. Wilkins withdrew earlier pleas and entered a plea of guilty to the charges of first degree murder, armed criminal action, and unlawful use of a weapon. During this time, Mr. Wilkins as well as the prosecuting attorneys recommended the death penalty. The court accepted the guilty plea. On June 22, 1986 following a sentencing hearing Mr. Wilkins was sentenced to death.

A amicus curiae brief was filed by Ms. McKerrow and Ms. Thompson which was heard on October 3, 1986, at which time having listened to the arguments and Mr. Wilkins' testimony, this examination was ordered.

*Summary of Mental Examination at Western Missouri Mental Health Center:*

Except for the report that Mr. Wilkins had ingested LSD approximately four hours before the alleged offense and having admitted to moderately heavy recreational use of both alcohol and a variety of illicit drugs (primarily hallucinogens), Dr. Mandracchia did not find any significant information and concluded that he does not suffer from any mental disease or defect, pursuant to the provisions of Chapter 552, Revised Statutes of Missouri. He also opined that Mr. Wilkins was competent to assist his legal counsel and cooperate with the court in his own best interest.

*Summary of Dr. Logan's Report:*

After exhaustive review of his past history obtained from Mr. Wilkins' evaluation at Tri-County Mental Health Center, Western Missouri Mental Health Center

during August and September of 1979, records from Butterfield Youth Services between the periods of 2/1/80 until 5/20/83, reports of staff members at Crittenton Center covering the period of 5/20/83 through 11/17/83, and a personal interview of five hours, Dr. Logan reported that Mr. Wilkins had an accurate understanding of the charges pending against him, potential penalties if convicted, possible pleas, the role of various officers and procedures of the court, and possession of sufficient memory and the ability to relate details of his case to his attorney, however, he stopped short of giving an opinion as to whether he was competent to proceed or not. Dr. Logan indicated in his report that although Mr. Wilkin's cognitive capacity was intact, his actions were governed more by his emotions. He emphasized that his wish to die and determination to plead guilty to speedily effect this and had resulted in his (Mr. Wilkins) feeling that his attorney was not working in his best interest. Thus, Dr. Logan stated, "In conclusion, while the patient has an adequate factual understanding of his situation and the ability to cooperate with his attorney, emotional issues may prevent him from acting in his own best interests. The weighing of these two factors, the cognitive versus emotional, is the essence of the decision before the court." Dr. Logan further opined that Mr. Wilkins suffered from a severe personality disorder characterized by enduring maladaptive patterns of perceiving, conceiving, and relating to his environment. He concluded that his diagnoses were "Conduct Disorder Undersocialized, Aggressive Type; Hallucinogens and Cannabis Abuse; Borderline and Schizotypal Personality Disorders." He also opined that although he had suffered from a mental disease at the time of the crime, he had the ability to appreciate the nature, quality, and wrongfulness of his conduct and the ability to conform his conduct to the requirements of law.



*Summary of report of Dr. Berg:*

After administering WAIS-R, Animal Choice Test, TAT, and Rorschach Test, Dr. Berg indicated that the referral had occurred because his attorney had in his possession forms written by Mr. Wilkins which presented rather morbid preoccupations regarding death and that he had shown a disinterest in mounting a legal defense and had shown readiness to accept the death penalty.

Dr. Berg found Mr. Wilkins to be functioning at a full Scale IQ of 105. On subtests, he demonstrated a disinterest or inability to sustain logical and stepwise problem solving in situations calling for careful and deliberate thoughts. There was some tendency to associate ideas on the basis of rhythm. For example, when asked to explain Marie Curie's achievement, he said, "For inventing mercury." The definition of "plagiarize" was, "The act of getting pleasure." Although he appeared to have cognitive capabilities, his responses to abstraction and integration were impulsive and reflective of an inaccurate, vague, and mildly distorted understanding of social conventions. He also used words and phrases in an odd, idiosyncratic manner, such as describing a slender individual as "demuscular" and referring to Martin Luther King as "freedom mover." After citing several examples of his responses to test situations, Dr. Berg opined that Mr. Wilkins presented a picture of Conduct Disorder, Undersocialized, Aggressive Type, a disorder manifested by acting out towards the outside world in an attempt to suppress underlying feelings of anxiety, depression, and anger. It was his opinion that these feelings interfered with his ability to think clearly, thus, giving rise to impulsive action which when combined with his anger at the outside world, which has rejected him, lead to spasms of destructive action.

*Summary of Presentence Report:*

Mr. Steven Haynes, after reviewing the past reports as well as talking to his mother, concluded that proba-

tion was not possible on the charges of murder, first degree; armed criminal action; and no recommendations were offered.

It should be noted that Ms. Wilkins reiterated the fact that he felt like a celebrity in jail and while growing up she did not have time for Mr. Wilkins because of her preoccupation with his older brother Jerrod. She admitted denying existence of serious problems with Heath even though they were pointed out by authorities at Butterfield and Crittenton.

*Summary of Pertinent Past History:*

Mr. Wilkins is the younger of two sons born to his father and mother. He was born in Little Rock, Arkansas and did not remember his father since his parents were divorced when he was approximately four years of age. He was raised in a rather poor socioeconomic environment and did have some problems in his school years. He admittedly fought with other students and organized fights with bunches of people. Mr. Wilkins reportedly had extremely chaotic upbringing during his childhood. He was physically abused by his mother, sometimes the beatings would last for two hours. Mr. Wilkins, during my interviewing, described how he and his brother would get locked in the bedroom and tape would be placed on the door. If the tape was broken then they would get punished. In spite of this, he felt that he was his mother's favorite child. As a child, he started robbing houses for knives and money and loved to set fires. Mr. Wilkins' mother worked at night and slept during the day, thus, the children were left alone at night by themselves. He claims that he was started on drugs by his uncle. Apparently he used to shoot BB guns at passing cars. Mr. Wilkins indicated that his mother's boyfriend had a quick temper and that he hated him. He also started disliking his mother, not only because she punished them, but also because she stood up for her boyfriend who was un-

kind towards them. He then decided to poison his mother and boyfriend by placing rat poison in Tylenol capsules. They were informed by his brother about the situation. They secretly emptied the capsules and made him eat them. He was afraid of death and attempted vomiting by placing fingers in his throat. Then he ended up getting a beating from his mother and boyfriend. At the age of ten, Mr. Wilkins was evaluated at Tri-County Mental Health Center and Western Missouri Mental Health Center. He stayed there for a period of six months. He was then sent to Butterfield Youth's Home and then to East Range, a residential facility for boys. He started using drugs quite heavily. In addition to marijuana, which he grew on his own, he also abused inhalants, specifically a substance called "rush" which was a locker deodorant and gasoline. He additionally stole LSD from other residents which admittedly caused him to have hallucinations. He also started drinking hard liquor and because of his drug and alcohol usage, he was kicked out of the eighth grade.

At Butterfield, he was very angry at the teachers because they considered him to be "dumb." He showed rather strange behavior there. When he became depressed he would dance with a net over his head. On another occasion he cut his wrist and claimed to have had frequent thoughts of suicide. Prior to going to Butterfield, he had jumped off a bridge but the car swerved before he was hit. At Butterfield, he attempted to overdose with alcohol and drugs, and another time with anti-psychotic medication, Mellaril. Mr. Wilkins was placed on Mellaril because he was "too active." He stayed at the Butterfield Youth Home for three and one half years between the ages of 10 through 13-1/2. After that, he was transferred to Crittenton Center since it was closer to his mother's residence. He stayed there only for four or five months and was then kicked out. The court gave him permission to go home on probation. At this time his mother had started seeing another boyfriend and Mr.

Wilkins apparently liked him. He continued the usage of alcohol and drugs while at school, continued to break into houses stealing money, jewelry, and knives, and generally stole money to spend at the arcade. On one occasion he ran away to Southern California. He was introduced to amphetamines there and spent all his money. His mother wired a ticket for him to return home. After his return, Mr. Wilkins was charged with a stolen knife and was sent to Detention Center in Mexico, Missouri. At age 15 he was sent to the Northwest Regional Youth Services in Kansas City. There, an attempt at prescribing Thorazine (major tranquilizer) was made. After this, Mr. Wilkins was placed in a foster home. He ran away from the foster home and lived in the basement of the home of a friend who was a tree trimmer and worked with him approximately two months. At this time he opted to go to the Job Corps. Thus, the parole was not violated. He went to Clearfield, Utah, but after a week he quit and returned to Kansas City to begin living on his own. Beginning in May of 1985, he lived on the streets, frequently sleeping in a park and dating a young girl whom he had met at Northwest Regional Youth Services. He actively looked for a job using his mother's phone number. However, his mother did not relay the calls to him and thus he continued to steal merchandise, selling it to a fence for profit. He was getting more and more involved with drugs and alcohol, LSD being his favorite drug. Prior to the alleged offense, he had been kicked out of his mother's house because she felt she was being lied to and he was living in a park with his friends. Mr. Wilkins reported that during this period of time, he could not sleep, eat, or even engage in sex with his girlfriend. He was using homemade LSD quite often, and on the day of the alleged crime he had done three hits of "black dragon (LSD-like hallucinogen).

As per Dr. Logan's report, who had evaluated prior records at various facilities, indicated that Mr. Wilkins had expressed sadness and unhappiness related to not



receiving attention from his mother, to staff at Tri-County Mental Health Center, and had fantasized about a possible relationship with his father which did not exist. He explained that the thefts were an attempt to gain his mother's attention and to look cool to his friends. Psychological testing at that time reflected a normal IQ, and the symptoms of anxiety, tearfulness, and depression were noted. The records also indicated that he had a tendency to deny conflicts alternatively withdrawing into depression or acting out his depression in an aggressive psychopathic manner without consideration of the consequences and a minimum of remorse. He openly talked about suicidal thoughts and felt to be at risk for suicidal or homicidal attacks and the possibility of a thought disorder of paranoid nature was considered as a diagnostic possibility.

Records from Butterfield Youth Services in Marshall, Missouri indicated that Mr. Wilkins' natural father was committed to a mental institution in Arkansas, and there was considerable amount of physical abuse that existed in the family. Mr. Wilkins was considered to be a loner and had alienated his peers because of sarcastic, cutting remarks. He complained of stressed induced headaches and had difficulty concentrating on what he read or remembering visual or auditory materials, although a hearing evaluation revealed no problem. In the educational testing, he gave rather unusual responses. For example, when asked the reasons why we need policemen, he replied, "To get rid of people like me." He also revealed plans to blow up a large building in Kansas City saying there was too large a population, and the people would not be missed. He also made bizarre derogatory sexual comments towards women prior to visits with his mother. He had episodes of hyperventilation and passed out by fainting or chest squeezing. In the last six months of 1981, there was no family contact and he started becoming suspicious of adults and peers. On one occasion in September of 1981, he put gasoline into a toilet and set

fire to it, causing an explosion. Mr. Wilkins' brother was diagnosed to be suffering from schizophrenia when he was admitted along with Mr. Wilkins in 1982 at Crittenton Center. Mr. Wilkins was often noted to be fantasizing about outer space and supernatural powers. In the fall of 1982, Dr. Chapel, the psychiatrist at Crittenton Center, recommended placement on Mellaril because of a "disoriented thinking pattern and high anxiety." In 1983, his condition started deteriorating. He was transferred to private tutoring from the public school, and he decided to try to earn his way out of the Youth Home. His final diagnoses in November of 1983 when he was discharged from Crittenton were Borderline Personality and Passive-Aggressive Personality. Psychological testing at Crittenton indicated isolated episodes of paranoid functioning. There was explicit distrust of doctors and others who pose to help him, whom he thought were interested in accomplishment of their own desires, and the treating psychologist expressed a serious concern about violent, destructive, and self-destructive action.

*Summary of Interview at Missouri State Penitentiary:*

Mr. Wilkins who is a rather diminutive individual with a short beard and moustache. He was handcuffed and interviewed in an open cell in the death row area. There were two officers sitting outside of the cell and I was accompanied by Ms. Penny Hooss, psychologist working at the Missouri State Penitentiary. After informing him of the purpose of my visit which he clearly understood, Mr. Wilkins decided to talk freely, however, repeatedly looked behind him at the officers as if to see if they were hearing or watching him. He repeatedly tried to roll his own cigarettes to smoke, however, threw the tobacco and the paper on the floor, having failed in his attempts. On two occasions, he did borrow cigarettes from the guards. In spite of his suspiciousness Mr. Wilkins was quite cooperative during the interview and imparted information



quite readily. Mr. Wilkins' interview was geared towards eliciting information to determine his ability to understand his Constitutional Rights and his reasons for waiving his right to counsel, in addition to assess his mental status in order to determine his ability to receive, retain, and recall information.

In spite of rather difficult circumstances, Mr. Wilkins talked rather freely and was functioning at the Bright Normal range of intelligence. This intelligence appeared to be consistent with his previous testing done by Dr. Berg.

Mr. Wilkins' version of the offense was basically similar to that he had imparted to other psychiatrists and police with one exception, that he stated that he did not plan to hurt anybody prior to the alleged offense, but merely had planned to rob in order to get money for drugs, although he did admit to the statement he had made to his codefendants and the police that he did not want any witnesses. Mr. Wilkins was able to give extensive details of his past history, including his tenure at Butterfield and Crittenton, as well as his treatment at Western Missouri Mental Health Center and Tri-County Mental Health Center. He recalled that his experiences there were rather horrifying. Mr. Wilkins dwelled rather extensively at his experiences at being put in straight jacket and being "pumped with Thorazine," causing him to feel like a "zombie." He also talked about being sexually abused at one of the Detention Centers in a tangential way while describing why he did not opt to be in the general population of Missouri State Penitentiary. Mr. Wilkins talked about his difficult times at home, including his anger towards his mother and stepfather (mother's boyfriend) who had been physically abusive towards him and his brother and readily admitted that he had had thoughts of killing them by putting rat poison "cyanide or arsenic" in Tylenol capsules and how he became horrified and scared to death when they found out about it,

emptied the capsules, and made him swallow them. He compared such experiences at home with those at Butterfield, Crittenton, and the mental health centers, and how these experiences had led him to live on the streets and use drugs. His descriptions of all of these experiences as well as his feelings did not reveal any delusions (fixed ideas unshakable by logical reasoning). Mr. Wilkins denied any hallucinations (perceptions of hearing, seeing, feeling, smelling, or tasting without perceptual stimulation).

In order to understand his reasoning for waiving the counsel during the trial, Mr. Wilkins, in response to the question as to why he "fired his attorney," stated as follows: "I did not want an attorney because he did not want to ask for the death penalty. I felt that no attorney would want me to do that, also they would argue that anybody that wants to die is not making the right decision. They feel that as long as you have life you have a chance. When I pleaded guilty, I didn't have an attorney, I told the judge I deserved the death penalty since I had committed a cold-blooded murder." When asked whether he was capable of presenting both aggravating and mitigating circumstances to arrive at the opinion that he should get the death penalty, Mr. Wilkins answered, "I don't know of any mitigating circumstances. They were saying that my background history was poor, but I don't think that anybody should drag other people into this." Mr. Wilkins admitted that he did not want his past history to be "dragged around" in the court. He continued that he had told Dr. Logan a lot of things but many things were then twisted around, and he felt that much of the information would not have helped him anyway. He stated for example, he was reported to have shot at passing cars, etc., "I didn't have any gun to shoot at passing cars, I had a BB gun. I wouldn't be that stupid to kill people like that." Mr. Wilkins further added that he did not want his mother's physical abuse

of him to be brought out because he likes his mother and has developed a better relationship since his incarceration. When inquired as to why after pleading guilty he did not let the judge make up his mind about giving him either 50 years without parole or the death sentence since it was up to the judge to decide sentencing based on the information available to him, Mr. Wilkins stated, "I would rather die than spend the rest of my life in prison. I thought I would get better treatment if I asked for the death penalty because I would be in a special population. Have you seen what they can do, I have been told a lot of horror stories." When asked why he did not choose for a jury trial since it may have resulted in a lesser sentence, he stated, "What's the difference between 25 years and 50 years, you still have to spend your time in the general population, getting raped or stuck in the solitary and then they pump Thorazine and all kinds of stuff into you. People on the outside don't know how it is." Mr. Wilkins indicated that although he had not been in an adult prison, he was equating his experiences at Butterfield, Crittenton, and other mental hospitals to be equal to what he would be going through in the general population or possibly worse than that. In emphasizing this point, he indicated that he was placed in SMU (Social Maladjustment Unit), where he was placed in a solitary cell without any interaction with others and was stripped of all of his possessions as well as clothing. In his mind, this experience at the SMU was equivalent to what he had experienced on occasions at the other facilities which caused him to run away from them. He indicated that that's the kind of life he would have if he were to be in general population during 25 or 50 years, and thus, had opted for the death penalty. Mr. Wilkins was then questioned as to why he underwent psychiatric examinations if he had always wanted to plead guilty and opted for a death penalty. He indicated that he wanted to go through the psychiatric examinations so that they could consider him competent and then he could plead

guilty. Mr. Wilkins' reasoning as to why he told Dr. Logan about his desire to opt for a death penalty if he wanted to be considered competent, he stated he wanted Dr. Logan to know everything about himself because he wanted him to know why it would be better for him to die. When inquired as to why Mr. Wilkins wanted to discharge his attorney when he had indeed done his part to prove that he is not "insane" and that he was competent to stand trial, Mr. Wilkins stated, "My attorney would not go for a death penalty." When asked as to why he has not sought some legal counsel while he is staying at the death row, Mr. Wilkins stated, "I want the death penalty so why should I ask for an attorney to appeal my case. There is nothing to appeal." Later on he stated, "I want to shorten all the legal steps as much as possible." When asked whether he would be satisfied if all the legal appeals were exhausted and then he could be put to death the next day, Mr. Wilkins replied, "No, I'm not prepared for that yet." He also stated that he is not looking for suicide because, "If I wanted to just die and kill myself I would have done that since I have had many opportunities to do so in jail or at prison. When asked why then he would not be prepared to die the very next day, Mr. Wilkins replied, "Nobody wants to die and I have to prepare myself for it." At this point of questioning Mr. Wilkins started realizing that he is rather ambivalent about the death penalty and immediately started stating, "Are you going to file this report without any emotional bias or you're just going to say I'm incompetent. I'll be very disappointed with that."

Further inquiring as to why he did not want his background information presented as mitigating factors and why he now claims that he did not use any drugs prior to the alleged crime when he had already made the statements to both Dr. Logan and Dr. Mandracchia that he indeed was using LSD prior to the alleged crime and that his actions were described by him as "stupid" and that



he was "consumed," in relation to this, and that he made a statement to the doctors examining him that he realized his actions did not make any sense, why he is denying those claims and statements now stating that he was not taking any drugs prior to the alleged crime. He hesitated, but then added that those can't be considered mitigating circumstances. Mr. Wilkins spontaneously stated, "Have you ever seen anybody put to death yet. There are lots of people sitting on the death row but nobody gets killed. They all get special treatment and you can go on for a long time before you can die, and I'm going to get that time."

Mr. Wilkins' orientation was appropriate. He was able to give the time, date, year, etc., as well as his demographic information appropriately. He was able to recollect past events in a rather chronological order without any difficulty in recollection. He was able to abstract from proverb, was somewhat idiosyncratic, he interpreted the proverb 'Don't cry over spilt milk' as "You have to be responsible for what you do."

In order to determine what are the alternatives he could have or he has thought of in his particular legal situation, Mr. Wilkins was asked questions related to the understanding of his legal options. He indicated that he understood that if he were to be considered incompetent to waive his Constitutional Rights he will have to be forcibly accept a legal counsel. He stated that he is afraid that if he were to be considered mentally disordered by a psychiatrist he may have to go back to a mental institutions which he detested the most. He also understood that if he is reconsidered for 50 years without parole because he has already pleaded guilty to first degree murder, he would be moving into general population which again is not a desirable option for him, primarily because of his feeling that he will be mistreated both by the staff and the inmates. Mr. Wilkins understood that there is a remote possibility of being pardoned

by the Governor or there may be some technical problems in the presentation of his case which might result in overturning the decision or he might get a rehearing. He stated that in spite of that he does not see how he could get out of the prison system and that instead of going through his life in the general population, he would rather stay on the death row and take the death penalty.

#### DIAGNOSES:

Based on Mr. Wilkins' history and his age, he fits the diagnosis of Conduct Disorder, Undersocialized-Aggressive Type. The behavior that was taken into consideration for this diagnosis is evidenced by aggressive activity against persons and property, thefts outside of the home, having any peer or group friendships or relationships which lasted only over a very short period of time, evidence that he has shown remorse and guilt about certain actions which were considered dyssocial even when he was not incarcerated or was in any difficulty, his current situation which resulted as a collective action of four people, however, his refusal to blame them and take all of the responsibility upon himself and having had this behavioral difficulties for a number of years resulting in institutionalization. Mr. Wilkins also has an extensive history of alcohol and drug abuse having used gasoline, glue, pot, uppers and downers since the age of six on a rather regular basis and having used LSD quite frequently. These diagnoses are the primary diagnoses in his case and can be formally placed on Axis I of the Diagnostic Coding suggested by Diagnostic and Statistical Manual of Psychiatric Association.

The diagnosis on Axis II or disorders of personality and underlying difficulties in responses to stressful situations in an individual can be applicable in Mr. Wilkins' case as Dr. Logan had pointed out and Mr. Wilkins certainly meets the criteria for such diagnosis. His diagnosis under this axis would be that of Borderline Per-



sonality Disorder. A person with such disorder has difficulty in establishing a pattern of predictable response to stressful situations vacillating between aggression towards others or self-destructive activity.

Other than this, Mr. Wilkins also has been seen to be exhibiting bizarre behavior, paranoid ideation, and idiosyncratic thinking dating back to 1982 when he was at Crittenton Center for drug and alcohol addiction and was diagnosed as suffering from schizophrenia. This diagnosis was not made at this time because of lack of further evidence and the possibility of many of his symptoms may be related to alcohol and drug usage.

#### *DISCUSSION:*

Having no clear-cut psychiatric test to determine competency to waive Constitutional Rights and legal counsel, it was felt necessary that one should define mental disease, defect, and disorder, ability to reason, and one's ability to act upon these reasons in a rational manner in order to arrive at an opinion whether Mr. Wilkins meets the appropriate criteria from a psychiatric viewpoint to waive his rights.

Mental disease and defect are legal terms for which there is very little definition available from a psychiatric viewpoint, however, it is generally accepted that mental disease is a term applied to conditions which present themselves as an abnormality of thinking or mood such as hallucinations, delusions, manic behavior, and depression, as well as pervasive anxiety which is manifested by paralysis of effective functioning in reality which is complained by an individual. Mental defect is a condition which causes a person to have difficulty in either receiving, retaining, or recalling information and applying it in reality situations. The latter is generally manifested by people who have mental retardation or organic brain deficit.

Mental disorders are defined as clinically significant behavioral or psychological syndromes or patterns that occur in an individual manifested either by a painful symptom or impairment in one or more important areas of functioning. Under this concept, Mr. Wilkins' condition appears to be related to a mental disorder rather than a defect or disease. Reviewing past history as well as records, it appears that Mr. Wilkins for most of the time has had conscious control over his behavior. However, the reasoning behind his conscious behavior appears to be based on lack of rationality and disregard for long-term consequences. For example, when he had tried to poison his mother and her boyfriend he seems to be quite aware of the wrongfulness of such action. However, in his mind his reasoning was "If they don't understand you or are abusing you then it is alright to kill them." Such rationalization discards any consequences of such action and jeopardizing one's future growth and freedom in view of immediate elimination of the problem at hand. It could be argued that similar thinking is present in antisocial persons, however, Mr. Wilkins not only had not developed a full personality and was a child when such reasoning was evidenced. An antisocial individual is a physically mature person who does not have to depend on others for nurturance unlike Heath. Similar reasoning is evident in the alleged crime. Mr. Wilkins asking for the death penalty also seems to be based on such faulty reasoning. He starts by the premise that he deserves the death penalty because he had committed a cold-blooded murder. However, immediately adds that nobody on the death row has died yet, so not only that he will live but also will get the special privilege of being on the death row as opposed to the imagined torture and humiliation in the general population. It should be noted that Mr. Wilkins' description of what happens or what could happen in the general population of Missouri State Penitentiary is based on his experience at juvenile homes, foster homes, and mental health centers and not based

on adult experience at these facilities. Awaiting his placement in death row, he was in the SMU (Social Maladjustment Unit) where he subjectively felt being treated worse than at the death row. He equates this to the treatment he would receive in the general population. During the interview, when it was repeatedly pointed out to him that there were several mitigating factors in his case he chose not to elaborate on them and repeatedly made the same statement over and over that he deserves the death penalty because he had committed a cold-blooded murder. Mr. Wilkins not wanting his mother to be brought into the court and to be portrayed as an unfit mother also seems to be based on the fact that he does not want to jeopardize his relationship with his mother which seems to have improved after his conviction. He tends to completely ignore the fact that he was living in the Penguin Park for several days having no place to live because of his mother's total abandonment in spite of his being a juvenile. Mr. Wilkins, during the current interview, denies any drug usage prior to the alleged crime, although he had admitted such to Dr. Logan on five occasions, again indicating that he vacillates in his choice of means to achieve the goal of wanting to be punished by death. If he had adequate and consistent reasoning he probably would have made the statement to Dr. Logan that he had premeditated the murder and that he did not have any drugs or alcohol in his system before he went there to the scene of the crime. His current denial and the statement that Dr. Logan had misunderstood many of his verbalizations appears to be an impulsive decision in order to expedite his execution again whether he really intends that is not clear because when a direct question is posed if he would like to be executed tomorrow if all the legal processes could be terminated today, he answers negatively, claiming that he is not ready to die yet. Thus, the reasoning for waiving his Constitutional Rights is based on his tendency to use limited pieces of information to justify

his emotional bias. He tends not only to convict himself but also pass a judgment as to how he should be punished. This tendency was evident when asked by the trial judge for a recommendation. Mr. Wilkins joined the prosecuting attorney in recommending a death penalty.

Mr. Wilkins' psychological test done by Dr. Berg also reveals his disinterest or inability to sustain logical and stepwise problem solving in situations calling for careful and deliberate thought.

His testimony at the time of his hearing on October 3, 1986 at the Supreme Court when summoned by Chief Justice Higgins, Mr. Wilkins instead of addressing the issues raised by the attorneys for amicus curiae and the Assistant Attorney General made rather curious comment which sounded almost like he was presenting the mitigating circumstances in his case, however, ended up stating that he had made a rational decision to waive the counsel. He stated, "Your Honor, there were several comments made into the question of my competency at the time of the crime, and also my competency at my trials and my hearings. I would like to, for the court to be aware of, as was stated by the ladies and gentlemen over there, that I had a . . . . I don't know the exact words to put it in, a background of mental and psychological problems and that I've been in some previous institutions. And I would just like for the court to be aware before the crime, I was in an institution known as Northwest Regional Youth Services, run by the Division of Family Services of the state of Missouri. That is an intense psychological and . . . intense psychological program to help children of the ages of 14 to 18 and to decide if they need any further mental evaluations . . . any help to help them proceed into society and to become decent citizens. I was in that program for I think as I can recall for over 9 months, and I completed that program and I was released on a . . . into the custody of



my foster parents that I was assigned to, and I had, I guess, I would put it into my language, a clean bill of sale. I completed a highly intense evaluation and program set up by the state of Missouri specifically for situations and problem children like me, and I completed the program. And I would, as was mentioned by one of you gentlemen a little earlier, about Mandracchia, when he did his mental evaluation of me at the time, he did not know that I had intentions of seeking the death penalty. And then when Dr. Logan and his associates did their evaluation later in time, they did know that I was seeking the death penalty. And that there should give a very clear, as . . . let you see both sides of the, how should I put this . . . to let you understand that something wasn't spontaneous act, because at the time Mandracchia, the first mental evaluation was commenced, I had already made that decision and consulted with my attorney, Mr. Duchardt, who was at that time my attorney, about what I wanted to do. And then I asked him, don't . . . let's not . . . let's keep this between us, and so we went on with the evaluations. And I think that there has a lot to do with Dr. Logan's opinion that he would rather leave it to wiser souls than himself, which I respect.

Also there came up a question it was never questioned that . . . why I dismissed my public defender, Mr. Duchardt, why I dismissed him. And it was also stated that I said, 'Well, if the attorney could help me get the death penalty,' At that time Mr. Duchardt was having some turmoil within himself because I was asking him to do something that was against his moral and ethical judgment and his values. And I felt it upon myself to make the decision that when an attorney is faced with those obstacles, that I would proceed in the direction in getting the goals that I wanted without the assistance of an attorney. And that is why, that is why I did that. That's all I want to say."

Having discussed the difficulty in Mr. Wilkins' reasoning capabilities, I would like to make a brief comment as to his cognitive capabilities. Without laboring into the findings of previous psychological tests I would have to concur that Mr. Wilkins' ability to perceive, retain, and recall information is adequate for the purposes of courtroom situations and if he wanted to he could impart the same information to his legal counsel. Thus, his determination that he was competent to proceed was appropriate. However, currently we are at a point where we have to determine whether Mr. Wilkins is capable of acting in his own behalf. This is where the question of reasoning ability and acting out impulsively without regard for long-term consequences etc. becomes a point of discussion. Both Dr. Logan and Dr. Berg had discussed this issue in their finding at length and behavioral observations of Mr. Wilkins' behavior at the institutions he was housed has been quite well documented in the records. These behavioral observations date back to 1980 and are congruent with the psychological test findings of Dr. Berg. These include his suicidal attempts, his aggressive behaviors and intense anger towards females. Another example of Mr. Wilkins acting out in a self-destructive manner is the fact that although he understands that he had committed a crime for which the penalty would be either 50 years in prison without parole or death penalty, he chooses the death penalty for unclear reasons. On one hand he claims to waive his right to counsel to expedite the process but on the other hand he does not want to be executed tomorrow, that being too soon. A person with a fully competent mind will not hesitate to take the quickest route if he has already determined the end. This clearly shows his impulsive and emotional decision making tendency based on faulty or inadequate information. He also fails to understand that the ultimate fact finding and judgment is the function of the jury or the judge and that he must impart truth but facts regarding his development, his reasoning, his



understanding, and his feelings before the crime, at the time of the crime, and after the crime in order that appropriate punishment could be meted out. He also seemed to be rather concrete on his understanding of the degree of severity of his crime and his position seems to be that either he is free on the streets or he is put to death rather than "suffering" for a long time in the prison population. Even if Mr. Wilkins was to plead guilty to the charges he should present an accurate picture of the facts as they occurred including his prior history of psychiatric problems in order for the judge or the jury to make an appropriate decision. It appears that such rational thinking is not present with Mr. Wilkins, partly because of his age, partly because of his lack of growth in an emotionally secure environment and lack of parental supervision which led to his subsequent inadequacy to establish himself as a person in his own right. Mr. Wilkins' background also includes a mental illness in his natural father as well as his brother which presents a strong possibility of genetic predisposition to mental disorder which may have contributed to his distorted reasoning.

#### *SUMMARY AND RECOMMENDATIONS:*

1. Mr. Wilkins suffers from a mental disorder which cannot be specifically considered a mental defect or disease within the meaning of Chapter 552.010, Revised Statutes of Missouri. However, this disorder does effect his rational reasoning and impairs his behavior.
2. Because of his mental disorder he suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his Constitutional Rights and represent himself in front of the court.
3. Because of his unimpaired ability to receive, retain, and recall information, he is competent to assist his

attorney if one is appointed, although on occasions he may choose not to cooperate with him and evidentiary facts may have to be put forth by testimony of others.

Thanking you.

Respectfully submitted,

/s/ S. D. Parwatikar, M.D.  
S. D. PARWATIKAR, M.D.  
Forensic Psychiatrist

SDP/cmr

IN THE CIRCUIT COURT  
OF CLAY COUNTY, MISSOURI  
SEVENTH JUDICIAL CIRCUIT OF MISSOURI  
Liberty, Missouri

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Be it remembered at the June Term, 1986, the same being the 27th day of June, 1986, the following proceedings were had before the Honorable Glennon E. McFarland, Judge of Division Number One to wit:

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Case Number CR185-491FX

STATE OF MISSOURI

*Plaintiff*

vs.

HEATH A. WILKINS  
a/k/a Pyzon

*Defendant*

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Now on this 27th day of June, 1986, the State appears by prosecuting attorney and defendant appears in person. Defendant is again encouraged by the Court to accept the appointment of counsel or to obtain his own counsel and that he has a right to counsel and to trial by jury for all stages of this proceeding. Defendant having previously refused to accept the assistance of counsel now continues to refuse to accept the assistance of counsel. Defendant waives trial by jury for all stages of these proceedings.

State presents evidence. Defendant presents evidence. State presents argument. Defendant makes statement asking that the death penalty be imposed.

Court finds that defendant on May 9, 1986, withdrew previous plea of not guilty and not guilty by reason of mental disease or defect excluding responsibility and entered plea of guilty to the offense of Class A felony of murder in the first degree. Said plea was accepted by the Court. The Court finds that defendant at all times was and is mentally competent.

With respect to the murder of Nancy Allen by defendant, the Court finds beyond a reasonable doubt that the following aggravating circumstances exist:

1. The murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery, and
2. The murder in the first degree involved depravity of mind and that as a result thereof, it was outrageously or wantonly vile, horrible or inhuman.

The Court further finds beyond a reasonable doubt that either or both of such aggravating circumstances found to exist warrant the imposition of the death penalty. The Court after considering all other proper and lawful matters finds that the death penalty should be imposed.

The Court having announced to defendant the sentence to be imposed and having asked defendant whether he knows of any legal cause why judgment and sentence should not be imposed, and no cause to the contrary being shown or appearing to the Court, it is **THEREFORE ORDERED, SENTENCED AND ADJUDGED** that the defendant suffer the penalty of death. Defendant then asked if there be any legal reason to show that the execution of sentence should not be carried out. Court finds no legal reason why execution of sentence should not be carried out. It is further ordered that the Sheriff of Clay County, Missouri, deliver the defendant, Heath Wilkins, to the Warden of the Missouri State Penitentiary at Jefferson City, Missouri, on or before July 3, 1986,

and that the Warden of the Missouri Penitentiary at Jefferson City, Missouri, execute the sentence of death in this case on August 25, 1986, by the administration of lethal gas within the walls of the State Penitentiary at Jefferson City, Missouri, and that proper warrant issue accordingly.

/s/ Glennon E. McFarland  
GLENNON E. MCFARLAND  
Judge, Division Number One

SUPREME COURT OF MISSOURI  
EN BANC

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No. 68393

STATE OF MISSOURI,  
*Respondent,*

v.

HEATH A. WILKINS,  
*Appellant.*

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Sept. 15, 1987

Rehearing Denied Oct. 13, 1987

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BILLINGS, Chief Justice.

Defendant Heath A. Wilkins pleaded guilty to first degree murder and was sentenced to death for the brutal and multiple stabbing killing of a 26-year-old mother of two small children during the course of a robbery of the victim's convenience store. Affirmed.

Defendant, proceeding pro se after dismissing and waiving appointed counsel, entered pleas of guilty to the murder charge, armed criminal action (sentenced to life imprisonment), and unlawful use of a weapon (sentenced to five years imprisonment), the last charge arising at the time of defendant's arrest approximately two weeks after the murder. Even though defendant dismissed and waived his right to an attorney, the trial judge directed the attorney to stand by throughout all of the proceedings and be available to counsel and advise the defendant upon the latter's request.



The transcript of some 300 pages clearly reveals that the experienced and capable trial judge, the Honorable Glennon E. McFarland, fully explained, time and time again, defendant's various legal rights. Judge McFarland made repeated efforts to dissuade defendant from dismissing counsel and proceeding without an attorney. And, the conscientious trial judge offered to permit defendant to reconsider and withdraw his guilty pleas. Throughout the several court hearings, the defendant told the trial judge that he had fully and knowingly considered the alternative punishment of life imprisonment without eligibility for parole and that of the two possible sentences he preferred the death sentence. Section 565.020, RSMo 1986.

Because of defendant's stated position and acting as his own attorney, defendant did not take any of the prescribed steps to appeal his guilty plea and death penalty. Nevertheless, this Court requested the State Public Defender to enter the case as *amicus curiae* and to brief and argue "any issue subject to review."

The case was argued before the Court after defendant, appearing in person, advised the Court that he did not want the assistance of an attorney in the proceedings in this Court. At the conclusion of the arguments, the defendant was permitted to make a statement to the Court in which he took issue with some remarks of the public defender arguing the case. The Court ordered defendant examined by the Department of Mental Health of Missouri to determine defendant's competence to waive counsel on appeal and ordered the case held under submission pending the report.

The report and evaluation of the defendant by the Department of Mental Health was filed with the Court, and the Court set aside the submission and appointed counsel to represent defendant. New briefs were filed and argument heard anew.

The complete record, consisting of the legal file and transcript, are before the Court. In order that this Court can properly review the death penalty imposed in this case and also consider the points advanced by the appointed counsel, it is necessary to set forth in some detail the evidence which led to the imposition of the ultimate penalty.

Approximately two weeks before July 27, 1985, the date of Nancy Allen's murder, defendant's friend, Patrick Stevens, was telling the defendant that he needed some money. "I [Wilkins] said, 'I know where we can get some money.' . . . I told him exactly how we were going to do it and where we were going to do it." Defendant then described to Stevens a plan to rob Linda's Liquors, which was later communicated to two other confederates, Ray Thompson and Marjorie Filipiak. Linda's Liquors and Deli was owned and operated by Nancy and David Allen. It is a small convenience store located in the town of Avondale.

The four freely discussed the plan to rob Linda's or an alternative location during the next two weeks. Defendant also stated to the others that he would kill whoever was behind the counter because he wanted no witnesses. During the period before the crime, defendant sharpened his "butterfly" knife (a narrow-bladed martial arts weapon) with a diamond file. Defendant's girl friend, one of the four privy to the plan, attempted to dissuade him from his murderous plot. She had obtained some money from her parents and offered to run off with defendant but he declined.

On the evening of July 27, 1985, the four individuals were together. Defendant and his cohorts decided that the robbery of Linda's Liquors and Deli was on for that night. They all went to North Kansas City Hospital where they arrived about 10:15 p.m.

Leaving the other two, who were to secure taxis for after the robbery, defendant and Stevens left the hos-

pital. To avoid detection they went through the woods to the deli. They carried a bag for carrying stolen merchandise. They arrived at a creek near the deli about 10:30 p.m. They observed the deli for a time because there were customers present. When the last customer had gone, they approached the deli. They took a towel out of the bag and wiped their shoes so that they would not have mudprints. So that the counter person, Nancy Allen, would not be suspicious, they left the bag outside.

According to their prearranged plan, defendant ordered a sandwich while Stevens went to the rest room behind the counter. Noticing that Nancy Allen was not where Stevens could easily reach her, defendant asked her for additional lettuce. When she moved to comply with the defendant's request, Stevens rushed out of the rest room and grabbed her. Defendant went around the counter and thrust his knife into her back. Defendant said he was aiming at the kidneys, which he thought would be a fatal wound.

Nancy Allen fell face down onto the floor. However, she rolled into a spread-eagled position with her back on the floor. Stevens could not find everything that he wanted to take and could not operate the cash register. He asked defendant what to do. Nancy Allen replied, directing Stevens to what he sought but this caused defendant to stab his helpless victim three more times in her chest. Two of these pierced the heart. She continued to speak, begging for her life. Defendant silenced her with four stabs into the neck, one of which opened the carotid artery.

As Nancy Allen's pierced heart oozed its life's blood into the opened cavities of her lungs and onto the floor, defendant and Stevens gathered up cash and merchandise and left the store. Defendant wiped fingerprints off the door handle before leaving. They stuffed the stolen items in the bag outside and left. Nancy Allen lay dying on the floor.

The pair met their compatriots at the hospital. They paired up and left in separate taxis for the Greyhound Bus Depot. They paired up again in a different combination and went to their common summer hangout, Sherwood Lake. The cash register coin tray was thrown into the lake and they burned the stolen checks. A week later defendant wanted Stevens to lure "some guys" into the lake area so he, the defendant, could kill them. This action was aborted when a police officer came into the area and defendant threw the murder knife into the lake.

Street talk led the Metropolitan Major Case Squad to the defendant and his companions, and they were picked up by police on August 10th. Before taking a statement, Detective Ron Nichola advised defendant of his rights. Defendant's mother, Lt. Dave Rogers, and a juvenile officer were also present. An extremely incriminating statement was taken. The certification for 16-year-old Heath Wilkins' trial as an adult was obtained on August 15, 1985 as required by Section 211.071, RSMo Supp.1984.

The litany of Fifth Amendment rights was read again to defendant at his arraignment in circuit court on October 17, 1985. Appointed counsel Fred Duchardt of the Clay County Public Defender's Office represented Wilkins and entered a plea of "not guilty by reason of mental disease or defect excluding responsibility" or "not guilty" to all the charges against defendant. A mental examination was ordered and the results from the Western Missouri Mental Health Center were filed with the court on December 19, 1985. Defense counsel sought an additional examination, which was obtained privately at the Minninger Clinic in Topeka, Kansas. The results of that examination became available in April of 1986.

A competency hearing was set for April 16th to inquire into the competency of the defendant at the time of his act as well as his present competency to stand trial. Unknown to the court but after long discussions with



attorney Duchardt, defendant reversed his position. Defendant wanted to release counsel and proceed pro se, plead guilty, waive jury trial, and actively seek a sentence of death as his penalty.<sup>1</sup> The trial court first became fully aware of this turn of events at the April 16th competency hearing. Dr. Steven A. Mandracchia examined the defendant on November 27, 1985 before knowing that defendant intended to seek the death penalty. However, Dr. Mandracchia's opinions about defendant's competency were unequivocal. He said "that there was no evidence of mental disease or defect as defined by chapter 552 of the revised statutes of the state of Missouri." Later, after being advised of the defendant's intention to seek the death penalty, his opinion did not change. "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities."

Dr. William S. Logan, M.D., Director of Law and Psychiatry at the Menninger Foundation, examined the defendant in March 1986 after the defendant had made his fateful decision. Attorney Duchardt had fully advised Dr. Logan of Wilkins' intentions as did the examinee himself. Dr. Logan resisted giving the categorical competency opinion that Dr. Mandracchia had given. Nevertheless, he found that the defendant had average intelligence. Moreover, although he found that Wilkins suffered from some emotional disorders of long standing, Dr. Logan "didn't see [Wilkins] as meeting the criteria for a severe mental illness as defined under the statutes of Missouri." In fact, Dr. Logan characterized "the execu-

<sup>1</sup> This is not as novel as it might sound. See Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. of Crim.L. & Criminology 553, 553 (1984) (examining cases where convicted murders voluntarily terminated appeals that would have delayed their executions). "For some on death row, however, the darkest fear is not execution, but the prospect of living out their natural years incarcerated in a six-by-nine cell, under constant surveillance, with little or no hope of ever regaining their freedom." *Id.*

tion of the crime as very purposeful, very deliberate, very well planned . . . [with the defendant making] numerous efforts to avoid detection, showing that he appreciated the wrongfulness of it. . . ." After hearing this testimony and interrogating defendant, the court found defendant to be competent.

Despite the finding of defendant's competency, Judge McFarland did not immediately grant his motion to proceed pro se. The right to proceed without counsel upon a voluntary and intelligent election has been recognized by the Supreme Court of the United States. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975). However, the *Faretta* court recognized the disadvantages to a defendant who proceeds pro se. *Id.* at 834-35, 95 S.Ct. at 2540-41. Here, the trial court found itself faced with a peculiar constitutional quandary—a defendant may not be convicted and imprisoned without being accorded the right to assistance of counsel but a defendant may help himself into a conviction by his voluntary albeit inadequate self-representation. *Id.* at 832-33, 95 S.Ct. at 2539-40.

Consequently, the circuit judge took steps to ensure that the gravity and importance of defendant's decision was brought home to him. Judge McFarland explained the advantages of counsel to defendant, highlighted defendant's own inadequacies of education, age, and experience, and set the pro se hearing off for another week to ensure that defendant gave additional thought to this matter.

When the hearing resumed on April 23, 1986, the judge strongly voiced his belief that defendant should be represented by an attorney. He explained each consequence of defendant's action: the waiver of trial by jury on each charge including both phases of the murder trial, the ranges of punishment, the necessity of written waivers, as well as a detailed and vivid description of the effects



of execution by poison gas. Finally, he set a pleading hearing for May 9th and admonished the defendant to talk to those whom he trusted and who could advise him about his chosen course.

On May 9th, the circuit court reconvened to consider defendant's desire to change his pleas to guilty and to waive trial. Again, the court persisted in its efforts to convince the defendant that the course was unwise. Again, the court advised him of the enormity and finality of his waivers of legal rights. Defendant politely but firmly rejected the court's advice. Judge McFarland explained that this course would probably lead the court to impose a death penalty. But, he explained that defendant might still get the life sentence. Finally, the court took evidence to substantiate a factual basis for the change of plea. At length, the court concluded that defendant understood the consequences of his actions and that defendant voluntarily and knowingly was waiving his rights and entering guilty pleas, and the court accepted the pleas of guilty to all the charges including murder in the first degree.

At the sentencing hearing on June 27, 1986, the court entered the maximum sentences on the two lesser charges. Judge McFarland again reviewed the variety of rights available to the defendant for the asking. Defendant declined again. The court offered him a chance even at this late stage to withdraw his plea.

The Court: You understand that I think it would be in your best interests that you withdraw your plea?

Defendant: "I understand what you think, your Honor."

Evidence was taken in the sentencing stage. It amply supports the guilt of the defendant. Heath A. Wilkins stood up at his last opportunity to address the circuit court and told the court, "... I'm asking the court to

consider the death penalty as a [sic] more humane in the extent of possible happenings and pain received by, you know, me. . . . One I fear, the other one I don't."

Judge McFarland entered his order.

The court does feel that the defendant's decision [to ask for death] was made rationally and after due thought and deliberation. . . . The court finds beyond reasonable doubt that the following aggravating circumstances exist: number one, the murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery; and, number two, the murder in the first degree involved depravity of mind and that as a result thereof it was outrageously-or wantonly vile, horrible or inhuman.

Section 565.032.2 subs. (11) and (7), RSMo Supp.1984 (respectively).

Counsel for defendant raise four major points and multiple sub-points in their brief. First, that the trial court erred in finding defendant competent to proceed because the evidence was inadequate and that the trial court failed to make specific findings on the defendant's competency to waive his constitutional rights.

Second, counsel argued that the circuit court failed to consider mitigation at the sentencing hearing as required by the decision of the Supreme Court of the United States and the Missouri sentencing statute. Counsel also contend in their second point that the trial court erred quantitatively in weighing the aggravating circumstances it had found against the mitigating circumstances it had found. The court did not find two other aggravating circumstances beyond a reasonable doubt that had been requested for consideration by the State: "The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim

of the murder or another." Section 565.032.2(4). "The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness." Section 565.032.2(12).

Third, the death sentence should be set aside because it is comparatively disproportionate to the penalty imposed in similar cases.

Finally, counsel contends that the death penalty is cruel and unusual per the Eighth Amendment of the United States Constitution and Article I, Section 21 of the Missouri Constitution.

This Court has repeatedly rejected constitutional challenges to Missouri's death penalty provisions. *State v. Driscoll*, 711 S.W.2d 512, 517 (Mo. banc 1986) (list of citations). Similarly, the Supreme Court of the United States has held that the death penalty is not per se cruel and unusual punishment prohibited by the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 188-95, 96 S.Ct. 2909, 2932-36, 49 L.Ed.2d 859 (1976) (plurality opinion. Recent decisions have not varied from that course. See *Project: Criminal Procedure*, 75 Geo.L.J. 1170 (1987). The point should be denied.

Counsel contends that the lower court's finding of defendant's competency was not supported by sufficient evidence; further that the trial judge failed to make a specific finding of defendant's ability to waive constitutional rights. In testing sufficiency, the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding. *State v. Brown*, 660 S.W.2d 694, 698-99 (Mo. banc 1983). This Court has observed the defendant, his demeanor, and listened to him, and the trial judge had over a period of months observed the defendant for prolonged sessions of hearings.

The psychological record is not sufficient as characterized by counsel but extensive and consists not only of the expert testimony but also the galaxy of tests, and records on which they relied, from the numerous institutions with which defendant had dealt. The basic test is whether mental illness renders the criminal defendant incompetent to stand trial because he "lacks capacity to understand the proceedings against him or to assist in his own defense." Section 552.020.3(1), RSMo Supp.1984; see *Winick, Restructuring Competency to Stand Trial*, 32 U.C.L.A. L.Rev. 921, 923 (1985). The overwhelming and uncontroverted evidence on this record establishes that defendant has met and continues to meet this basic test.

Counsel urge that there should be a heightened test of competency in this case. Although an incompetent, as a juvenile, may be impaired by his limited cognitive and social capacities, cf. *Winick, supra*, at 961 (discussing various situations in which a defendant may waive his incompetency status), Judge McFarland could not have been more unbiased, reasonable and fair in his consideration of competency. Any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of *Miranda*. *Id.* at 961 (juveniles may validly waive both self-incrimination and right to counsel privileges). Moreover, and analogous to the threshold question of competency to stand trial, Missouri law presumes competency, as all persons are presumed to be free of mental disease or defect which would exclude their responsibility for their conduct. Section 552.030.7, RSMo Supp.1984. The point is denied.

In the second point it is contended that the trier failed to consider mitigation as required by state statute, Section 565.030.4 RSMo Supp.1984, and by *Eddings v. Oklahoma*, 455 U.S. 104, 110-14, 102 S.Ct. 869, 874-77, 71 L.Ed.2d 1 (1982). This claim is not supported by the record. The trial judge clearly indicates that he considered mitigating factors in addition to defendant's age



in the required trial report. Defendant was 16 years and seven months old when he murdered Nancy Allen. He was 17 years and four months old when he pleaded guilty. He had completed nine years of education and had an intelligence quotient of 105.<sup>2</sup>

The report of the trial judge shows that he considered whether the murder "was committed while the defendant was under the influence of extreme mental or emotional disturbance." Section 565.032.3(2), RSMo Supp.1984. Second, he considered whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Section 565.032.3(6).

Counsel suggest that the weighing of mitigating factors is a quantitative or tallying process. Clearly it is not. For example, the trier must assess the punishment in a capital murder case at life imprisonment "[i]f the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier." Section 565.030.4(3), RSMo Supp.1984. Just one mitigating factor might permissibly outweigh several aggravating circumstances under this provision and require the imposition of only life imprisonment and not the death penalty. But the reverse is also true. The trier may find that a single aggravating circumstance beyond a

<sup>2</sup> See: *Burger v. Kemp*, — U.S. —, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) and dissenting opinion of Powell, J., at 5143. Issue was alleged ineffective assistance of counsel. Defendant was 17-years-old at time of murder, had an I.Q. of 82, functioned at a 12-year-old level, and had possible brain damage from beatings when he was child.

*Thompson v. State*, 724 P.2d 780 (Okla.Crim.App. 1986) (defendant 15-years-old at time of murders), *cert. granted*, — U.S. —, 107 S.Ct. 1284-85, 94 L.Ed.2d 143 (1987), to consider whether Eighth Amendment imposes an age limitation on the application of the death penalty.

reasonable doubt "warrant[s] imposing the death sentence." Section 565.030.4(2). The trier's judgment as to the appropriateness of the sentence must be guided but is still discretionary. The weighing process is a qualitative one not a quantitative one. The trial court considered all the mitigating circumstances fairly presented by the evidence and did not find that they outweighed the aggravating circumstances found beyond a reasonable doubt. The point is denied.

Counsel in point three ask us to do no more than what this Court is mandated to do. Section 565.035, RSMo Supp. 1984. The court must review whether the imposition of the death penalty was influenced by passion or prejudice, was supported by evidence of the statutory aggravating factors enumerated by the trier of fact, or was disproportionate or excessive when compared to similar cases. See *State v. Battle*, 661 S.W.2d 487, 493-95 (Mo. banc 1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984).

The record bears no suggestion of prejudice, passion or any other arbitrary factor. The trial court's patience and fairplay were well-demonstrated throughout. Similarly, the evidence supports his finding that defendant Wilkins committed the murder of Nancy Allen in a wantonly vile, horrible and inhuman manner. With cool, deliberate premeditation he remorselessly executed the prone, helpless Nancy Allen, who had ample time to consider her demise, her husband, and her one-year-old and three-year-old girls. Defendant brutally silenced her pleas for mercy. The defendant freely admits that he committed this murder during a robbery, which supports the other aggravating circumstance found by the trier. The death penalty was not influenced by passion or prejudice and the evidence supports the trial court's finding of two aggravating circumstances beyond a reasonable doubt.



Finally, we are required to consider whether this sentence of death is disproportionate to the penalty imposed in similar cases considering both the circumstances of the crime and the defendant. *State v. Foster*, 700 S.W.2d 440, 445 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986). The cases the Court has reviewed demonstrate the penalty of death imposed here is not excessive or disproportionate to similar cases.

In *State v. Foster*, 700 S.W.2d 440, 441 (Mo. banc 1985), defendant, with an accomplice, planned an armed robbery of the apartment of two acquaintances. The jury in *Foster* found four aggravating circumstances including two which are essentially identical to those found in the instant case—a murder involving depravity and a murder for gain. Death was imposed. *Id.* at 445.

In *State v. Lashley*, 667 S.W.2d 712, 716 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), defendant was 17 years and one month old at the commission of the murder. Defendant with the intention of robbing the victim had stabbed the victim who did not die at the instant of attack. Lashley had been committed to various institutions and was considered to be of average intelligence. The death penalty was imposed.

In *State v. Newlon*, 627 S.W.2d 606, 609-10 (Mo. banc), *cert. denied*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982), an armed defendant entered a store with his accomplice after waiting for customers to leave so that the lone attendant would be isolated. Defendant entered knowing that the attendant might be killed after an accomplice's remark before they entered the store. The trier found that the murder was wantonly vile. *Id.* 627 S.W.2d at 621. The death penalty was imposed.

See also *State v. Johns*, 679 S.W.2d 253 (Mo. banc 1984), *cert. denied*, 470 U.S. 1034, 105 S.Ct. 1413, 84

L.Ed.2d 796 (1985); *State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); and *State v. Malone*, 694 S.W.2d 723 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2292, 90 L.Ed.2d 733 (1986).

Aside from the general principles of deterrence, defendant's execution-murder of Nancy Allen is exceptional in its brutality. Unlike any of the cited cases except *Newlon*, the evidence herein demonstrates an *express pre-existing plan* on defendant's part to kill anyone and everyone he found at Linda's Liquors and Deli to eliminate potential witnesses. This was no spur of the moment decision on defendant's part, but planned. Although the victim in this case was immediately assaulted when the robbery began, she had a substantial time in which to anticipate her fate and to plead for her life. *Cf. State v. Newlon*, 627 S.W.2d at 622. The suffering of the victim is certainly a factor in comparing this with other cases. *State v. Smith*, 649 S.W.2d 417, 434-35 (Mo. banc), *cert. denied*, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983). Even after inflicting a mortal wound upon Nancy Allen, defendant was not content to let her die. He inflicted further mutilation upon her by stabbing her repeatedly in the throat to stop her from talking. *Cf. State v. Johns*, 679 S.W.2d at 257; and *State v. Malone*, 694 S.W.2d at 724. As all of these facts demonstrate, the murder at bar is substantially more heinous than past killings which have been found to justify a sentence of death.

Another factor supporting defendant's sentence, newly recognized in Missouri's 1984 revision of the homicide statutes, is the strength of the evidence against him. Section 565.035.3(3). Heinous murders have been committed in the past in which the evidence of the crime was circumstantial and the precise role of the accused in the killing was unclear; in such cases, an inference exists that the jury may have rejected a sentence of death for

that reason. See, e.g., *State v. Turner*, 623 S.W.2d 4, 6-7 (Mo. banc 1981), *cert. denied*, 456 U.S. 931, 102 S.Ct. 1982, 72 L.Ed.2d 448 (1982); and *State v. Mitchell*, 611 S.W.2d 223, 224-25 (Mo. banc 1981). Such is not the case here. Defendant has admitted and described in great detail his dominant role in the killing of Nancy Allen from his planning of the murder in advance to his stabbing the victim to death, and his account is corroborated by autopsy evidence and the crime scene. By definition, the evidence of defendant's guilt could not be any greater than it is in a plea of guilty.

The final and a most chilling factor to be considered is the nature of defendant himself and his attitude toward human life. In his words, Nancy Allen was a "trash can" whose most convenient disposition was to be killed so she would not be "a bother" to defendant in the future. As evidenced by his actions, this statement by defendant is not mere bravado because he had made a prior and unconditional decision to kill the witnesses to his planned robberies and he had no reason to kill Nancy Allen other than the possibility that she might later testify against him. This was only one of a series of robberies and murders that defendant had intended to commit had he not been apprehended, and he had made attempts to kill people, including his mother, both before and after the Nancy Allen murder. There can be no doubt that, given defendant's attitude, he will unhesitatingly kill anyone who "gets in his way" unless and until he is prevented from doing so by the forces of civilized society. The sentence of death imposed upon defendant is the only reliable means of achieving that aim.

The judgment is affirmed.

ROBERTSON, RENDLEN and HIGGINS, JJ., concur; BLACKMAR, J., dissents in separate opinion filed; DONNELLY, J., dissents in separate opinion filed; WEL-LIVER, J., dissents in separate opinion filed and concurs in dissenting opinions of BLACKMAR and DONNELLY, JJ.

BLACKMAR, Judge, dissenting.

For the reasons assigned by Judge Billings the points raised by appointed counsel are without substance. The trial judge is to be commended for his fair and balanced handling of a very difficult situation.

Judge Billings expounds the deliberateness and atrocity of the killing. Judge Donnelly, in his dissenting opinion, demonstrates the vagaries in jury sentencing, describing killings which are no less repulsive, but in which the jury did not assess the death penalty. He senses a tendency to assess life rather than death when the offender is very young. I cannot add to the meticulous scholarship of both of my brethren.

Section 565.035.2, RSMo 1986, effective 10-1-84, directs us to "consider the punishment. . . ." Pursuant to this obligation, I would hold that a defendant who was a juvenile at the time of the offense should not be subject to the death penalty. In *State v. Battle*, 661 S.W.2d 487, 495 (Mo. banc 1983) and *State v. Lashley*, 667 S.W.2d 712, 717 (Mo. banc 1984), I argued unsuccessfully against death sentences for minors. I would draw a line at the juvenile level. Lines must be drawn somewhere; the offender below fourteen may not be punished as a criminal. See Section 211.071, RSMo 1986. The death sentence should be reserved for those capable of *mature* deliberation. See Ellison, "State Execution of Juveniles: Defining 'Youth' as a Mitigating Factor for Imposing a Sentence of Less than Death. 11 Law and Psychology Review 1 (Spring, 1987).



It is suggested that my position is contrary to state policy as defined by the legislature, inasmuch as the statutes contain no prohibition on the execution of persons who were juveniles at the time of commission of the offense. I believe that the duties imposed on us by Section 565.035.2 authorize us to adopt some objective standards for imposition of the death penalty. I also submit that our duties under that section are in addition to the duty of comparison imposed by 565.035.3, and that we should undertake a broader review of death sentences than we have in the past.

I concur with Judge Donnelly as to the remaining issues discussed in his dissenting opinion.

DONNELLY, Judge, dissenting.

Mandatory review under section 565.035, RSMo 1986.<sup>1</sup>

In this case, defendant entered pleas of guilty and expressed a desire to be put to death. The Court conducts its mandatory review, § 565.035, RSMo 1986, of a sentence of death, imposed following a hearing to determine punishment, § 565.032.2, RSMo Cum.Supp.1983. For reasons stated, we reduce sentence to life imprisonment without possibility of probation or parole, barring executive act.

The facts are undisputed, drawn from defendant's statements to a police investigator and to the trial court during the sentencing phase, from reports and testimony of psychiatrists who examined defendant, and from the report of a presentence investigator. On the night of the

<sup>1</sup> Defendant filed no after-trial motions or notice of appeal in this case. Counsel appointed to represent defendant in proceedings before this Court have briefed and argued numerous points of law. We decline to review these at this time, given our disposition of the case. We intend no suggestion as to the merit of counsel's claims which may be grounds for post-conviction relief under Rule 27.26; defendant may pursue such relief at his option.

fatal stabbing of Nancy Allen, defendant Wilkins was aged sixteen years, six months, twenty days. For about a month previous, he had been living on the streets of Kansas City with three other juveniles, Pat "Bo" Stevens, Roy "Shades" Thompson, and Marjorie "Midget" Filipiak. At Wilkins' initial suggestion, the foursome plotted to rob area businesses. Defendant proposed, and the group acceded to, Linda's Liquor & Deli in Avondale as an initial target. Wilkins maintained he would kill anyone present to conceal the perpetrators' identities. To facilitate his claimed objective, Wilkins purchased a narrow-bladed, martial arts knife from Stevens with money defendant had stolen from a laundromat.

As preconceived one to two weeks before, an intricate plan unfolded July 27, 1985. At or near 10:15 p.m., the four juveniles met at North Kansas City Hospital. Defendant and Stevens walked through a wooded area to the nearby deli, leaving Filipiak and Thompson at the hospital to await their return. The two boys stalked the target from along a neighboring creek while customers transacted business in the store and left. It was nearing closing time. Around 11:00 or 11:30 p.m., toting a change of clothes apiece in defendant's handbag, the two youths executed the crime. The handbag was left outside the deli to avert suspicion; both boys wiped mud from their shoes to avoid leaving footprints inside. Nancy Allen, the store clerk, was alone, seated behind the counter, when the boys entered. Wilkins ordered a sandwich. Stevens asked to use the restroom. When Stevens exited, he grabbed the victim, holding her while Wilkins rushed forward, produced the knife, and stabbed her in an area of her back he thought to be her kidney. Allen fell to the floor. Lying on her back, the victim responded to a question Stevens put to her, and began pleading with defendant not to kill her. Wilkins told Allen to be quiet, then stabbed her repeatedly in the chest and throat areas. Expert medical testimony indi-



cated Mrs. Allen probably was deceased before Wilkins imparted the last wound to her body.

Stevens pilfered cash, checks, liquor, cigarettes and rolling papers from the cash register and store displays. Roughly \$450.00 in cash and checks were taken. Stevens then "freaked out," and defendant had to push him out the door. Wilkins wiped Stevens' fingerprints from the doorknob before the pair made their immediate flight.

Defendant and Stevens rendezvoused with Filipiak and Thompson at the hospital. To evade any pursuit, the foursome left the hospital in cabs Filipiak summoned from two local cab companies. The juveniles rode in pairs to a Kansas City bus depot. There, they talked a while, divided the stolen cash, and the principals changed clothes. Stevens and Thompson left, again in a cab. Wilkins and Filipiak lagged behind about an hour to play video games, then left by the same means. The four met back at the lake area they frequented in Penguin Park and "tripped out." They used the stolen checks to start a fire. Defendant used his share of the money to buy drugs.

About a week later, Wilkins encouraged Stevens to lure "some guys" into the lake area so defendant could kill them. This plan was aborted when a patrolling police officer happened into the area. Wilkins threw his knife into the lake to avoid discovery. The weapon never was found.

Defendant was arrested August 10, 1985. He acquiesced to giving a statement, in which he admitted to and described in detail the deli store murder.

As indicated above, this case comes to the Court in a peculiar posture. Wilkins was certified to be tried as an adult and was appointed counsel, Mr. Frederick Duchardt. In late January or early February 1986, Wilkins informed Duchardt that he wished to withdraw an earlier plea, not guilty and not guilty by reason of

mental disease or defect, and substitute pleas of guilt to all charges.<sup>2</sup> Defendant also expressed a desire to seek the death penalty as his punishment. Counsel refused to aid Wilkins in this sordid goal.

Two psychiatrists and a clinical psychologist investigated defendant's competence to stand trial through interviews and testing. On considering the psychiatrists' testimony at an April 16, 1986, hearing, the trial court found Wilkins competent to proceed. Wilkins immediately moved, *pro se*, to represent himself before the court. One week later, the court accepted defendant's written waiver of counsel.<sup>3</sup> Mr. Duchardt was discharged from representation, but the court ordered him to remain available to answer any legal questions defendant might have.<sup>4</sup>

Wilkins immediately announced his desire to enter guilty pleas to all charges. The court attempted to dissuade him, to the point of describing how lethal-gas executions were performed. Defendant was encouraged to "talk to other people about this decision you're having to make," and the cause was continued until May 9, 1986. Wilkins persisted. When the case was resumed, he offered written petitions to enter the desired pleas. After extensive questioning, during which the trial judge offered defendant every opportunity to change his mind, the pleas were accepted as to each count. Sentencing was scheduled for June 27.<sup>5</sup>

<sup>2</sup> Wilkins was charged with first degree murder, § 565.020.2, RSMo 1986; armed criminal action, § 571.015, RSMo 1986; and unlawful use of a weapon, § 571.030.1, RSMo 1986.

<sup>3</sup> The court constantly reminded defendant of the wisdom of professional representation throughout these proceedings.

<sup>4</sup> The Court commends Mr. Duchardt's service to the court below, under what undoubtedly were frustrating circumstances.

<sup>5</sup> Indicative of the leeway the trial judge afforded Wilkins, the court informed that in the interim it would consider any change of heart Wilkins entertained reference his plea to the murder charge. Defendant remained firm in his intention.

Wilkins was given maximum sentences for the lesser offenses: five years' imprisonment for unlawful use of a weapon, life imprisonment for armed criminal action. The court then considered evidence on the appropriate sentence for Nancy Allen's murder.<sup>6</sup> In a bizarre climax to the proceedings, both prosecutor and defendant urged the ultimate sanction. Defendant realized his goal—the court passed a sentence of death. Supporting the sentence imposed, it found as aggravating circumstances that: 1) Defendant was engaged in perpetrating a felony (robbery) when the murder was committed, § 565.032.2(11); 2) The murder was outrageously or wantonly vile, horrible or inhuman, since it reflected depravity of mind, § 565.032.2(7).

Neither the record nor counsel suggest the sentence imposed reflects the least hint of passion, prejudice or arbitrariness. § 565.035.3(1), RSMo 1986. Moreover, the record supports the court's conclusions under section 565.032.2(7) & (11), RSMo 1986. We turn, therefore, to the dispositive question, "whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." § 565.035.3(3), RSMo 1986. *Under the facts of this case*, in light of Wilkin's age as of the offense, his prolific abuse of drugs and alcohol, and his long history of mental and emotional affliction, we hold the sentence excessive and disproportionate, and reduce that sentence to one of life imprisonment without possibility of probation or parole, barring executive clemency. § 565.035.5(2), RSMo 1986.

Relevant cases for a review of the appropriateness of the sentence are those in which the judge or jury first found the defendant guilty of capital murder and thereafter chose between death or life imprison-

<sup>6</sup> Defendant waived trial by jury for the penalty phase of his murder trial. See § 565.030.4, RSMo 1986.

ment without the possibility of parole for at least fifty years.

*State v. Bolder*, 635 S.W.2d 673, 685 (Mo. banc 1982), *cert. denied*, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1984).

First, we consider defendant's age. In four capital cases involving youths of comparable age, a life sentence was imposed. *State v. Greathouse*, 627 S.W.2d 592 (Mo. 1982) (defendant age seventeen); *State v. Allen*, 710 S.W.2d 912 (Mo.App.1986) (defendant age sixteen); *State v. White*, 694 S.W.2d 802 (Mo.App.1985) (defendant age seventeen); *State v. Scott*, 651 S.W.2d 199 (Mo.App.1983) (defendant age sixteen). Only one Missouri youth has been sentenced to die who was seventeen years old or younger as of his crime. *State v. Lashley*, 667 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

In *Greathouse*, *Allen*, *White*, and *Scott*, the jury was instructed on defendants' lack of prior criminal activity as a mitigating factor reference sentence. In this sense, the case *sub judice* is distinct.<sup>7</sup> But the jury was similarly instructed in *State v. Battle*, 661 S.W.2d 487 (Mo. banc 1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984) (defendant aged eighteen years, four months; no significant history of criminal activity; death sentence affirmed), and *State v. Blair*, 638 S.W.2d 739 (Mo. banc 1982), *cert. denied*, 459 U.S. 1188, 103 S.Ct. 838, 74 L.Ed.2d 1030, *reh'g denied*, 459 U.S. 1229, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983) (defendant eighteen; same history and sentence). As to *this age group* of offenders, then, the absence, and thus presence, of a significant history of criminal acts may be an unreliable

<sup>7</sup> Wilkins, from an early age, engaged in arsons, burglaries, and steading. These activities were before the court for its consideration during sentencing, embodied in Wilkins' juvenile records. § 211.321.1, RSMo 1986.



predicate for proportionality review. As to *this age group* of offenders, perhaps the most to be said is that age as a mitigating factor, § 565.030.3(7), RSMo 1986, *standing alone*, is insufficient to overturn a death sentence, on grounds the penalty is excessive or disproportionate, once the trier of fact has passed such sentence. *State v. Lashley*, 667 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *State v. Battle*, 661 S.W.2d at 494-95.<sup>8</sup>

Next, we look to cases in which death was imposed on a young offender and make comparison based on the nature of the killing. In *State v. Battle*, 661 S.W.2d 487 (Mo. banc 1983), *cert. denied*, 463 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984), defendant, eighteen, stabbed an eighty-year old woman with a twelve-inch butcher knife. The mortal wound was inflicted just below the victim's left eye. The elderly woman, "naked, beaten and ravished," suffered nearly three hours before she died. The jury recommended the death penalty, after being instructed only on the "vile, horrible or inhuman" nature of the killing as an aggravating circumstance. *See* § 565.032.2(7), RSMo 1986. *Battle* is different from this case. Nancy Allen was not sexually abused before or after the murder, *compare State v. White*, 694 S.W.2d 802 (Mo.App.1985) (indications victim may have been sexually molested after death; defendant seventeen, received life sentence), *with sub judice and Battle*; and, no evidence indicated Mrs. Allen suffered for any prolonged period after Wilkins attacked her. Indeed, the coroner indicated she may have been dead by the time defendant

<sup>8</sup> Counsel invite the Court to consider whether sentencing a minor to die constitutes a *per se* violation of the Eighth Amendment of the Federal Constitution. We decline. *Battle* and *Lashley* state the law in Missouri barring contrary adjudication in the United States Supreme Court. *See Thompson v. Oklahoma*, — U.S. —, 107 S.Ct. 1284, 94 L.Ed.2d 143, *cert. granted*, — U.S. —, 107 S.Ct. 1284-85, 94 L.Ed.2d 143 (1987).

imparted the last wound. Certainly this killing, however senseless, was no more repulsive than those involved in *State v. Beck*, 687 S.W.2d 155 (Mo. banc 1985), *cert. denied*, — U.S. —, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986) (nineteen-year old shot and killed elderly couple; life sentence); *State v. Greathouse*, 627 S.W.2d 592 (Mo. 1982) (seventeen-year old struck uncle with ax, then shot him eight times; life sentence); *State v. Baskerville*, 616 S.W.2d 839 (Mo.1982) (nineteen-year old; triple-murder, life sentence); *State v. Allen*, 710 S.W.2d 912 (Mo.App. 1986) (sixteen-year old, given life imprisonment; insisted after robbing couple, aged 67 and 68, that they be killed "the way Muslims kill people—by tying 'their ankles [?] to their feet'", laying each on stomach, then stabbing each in back of neck); *State v. Hurt*, 668 S.W.2d 206 (Mo.App.1984) (nineteen-year old, penitentiary inmate, killed cellmate by stabbing him more than sixty times; life term imposed); *State v. Scott*, 651 S.W.2d 199 (Mo.App.1983) (sixteen-year old; life imprisonment; robbed elderly couple at gunpoint, then stabbed wife twenty-two times; husband, also stabbed multiple times, survived).

In *State v. Lashley*, 678 S.W.2d 712 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), the victim was stabbed in an area of her head where a section of skull had been surgically removed, exposing a soft spot." Defendant was "seventeen years and one month old" as of the killing. His motive was to rob his fifty-five-year old, handicapped cousin; he did so in a manner described as "classic lying in wait." *Id.* 678 S.W.2d at 716. Wilkins' crime fits this genre. *See* § 565.032.2(4), RSMo 1986. But more is involved here, making *Lashley* distinct.<sup>9</sup> In none of the above, *Lashley*,

<sup>9</sup> We also note "the issue . . . is not whether any similar case can be found in which the jury imposed a [death] sentence, but whether the death sentence is excessive or disproportionate in light of similar cases' as a whole." *State v. Mallett*, 732 S.W.2d 527, 542 (Mo. banc 1987).



*Battle, Blair, Beck, Greathouse, Baskerville, Allen, Scott, Hurt, or White*, was the nature of the defendant such as to raise serious question, as here, whether the defendant should be held so completely responsible for his conduct that we should affirm his sentence.<sup>10</sup>

At age ten, Wilkins was referred to Tri-County Mental Health Center. For the next four to five years, excepting a seven-month probationary period at home, defendant underwent evaluation, treatment and detention at various Missouri institutions. He was diagnosed as possessing a borderline personality, schizotypal personality, and perhaps developing schizophrenia.<sup>11</sup> He was withdrawn, isolated, depressed, impulsive, displaying intermittent episodes of paranoid functioning. On at least two occasions, he was prescribed anti-psychotic medication. Officials at Crittenton Center expressed concern that defendant was at risk for violent, destructive, or self-destructive acts.<sup>12</sup> Indeed, Wilkins had on a number of occasions attempted suicide by cutting his wrist, overdosing on medication or illegal drugs, and leaping from a bridge into the path of a passing car.

Dr. Logan, who examined defendant to determine his competence to proceed below, intimated that Wilkins'

<sup>10</sup> We do not ignore the carefully-planned and carefully-executed nature of this heinous offense. Nor do we take lightly defendant's apparent disregard for the lives of others. We find only that Wilkins' age, his mental and emotional instability, and extensive drug use coagulate, inseparably, to quicken the conclusion, in our view the only conclusion, that the ultimate price is an excessive one to be levied on this defendant.

<sup>11</sup> Wilkins' brother was diagnosed a schizophrenic in 1982. His father was committed for a period of time in an Arkansas mental facility. On these bases, one examining psychiatrist suggested defendant's dysfunctioning may have a genetic component.

<sup>12</sup> Examining psychiatrist William Logan indicated these actions were intimately bound with defendant's disorder.

heavy drug use was tied to his cognitive functioning.<sup>13</sup> Dr. Parwatikar, who interviewed Wilkins at this Court's instance to determine his competency to waive appellate counsel, suggested defendant's youth, in turn, was a feature which distinguished his mental and emotional make-up from a mere antisocial condition.

Dr. Logan testified below that Wilkins "suffered from an ongoing emotional disturbance" of "profound" proportion; he reported that defendant's actions on July 27, 1985, could not be divorced from his psychopathology. Even though Wilkins' condition could not be termed a legally recognized mental disease or defect, Chapter 552 RSMo 1986, Logan submitted in his report that:

This is not to say that defendant did not suffer from significant impairment in his mental functioning as a result of mental disease which at the time of the crime hindered his emotional realization of the nature, quality, and wrongfulness of his conduct, and hindered his cognitive control of his conduct . . ."

On these facts, considering defendant's age, and his significant cognitive-emotional disorder, and connected, extensive drug abuse, we hold the sentence excessive and disproportionate. Consistent with this holding, we reduce Wilkins' sentence to life imprisonment without possibility of probation or parole barring executive act.<sup>14</sup>

<sup>13</sup> Defendant had used marijuana since he was five. He had abused inhalants, stimulants and depressants since age six. In the three summers prior to 1981, he estimated he had inhaled gasoline fumes on about 500 occasions. Since at least age ten or eleven, Wilkins had used LSD, by admission his favorite drug. On July 27, 1985, defendant ingested a home-made strain of the drug three times, the last at around 1:30 p.m. We find this drug use significant only to the extent it was a product of Wilkins' disorder, and to the extent it lends greater force to our conclusion, considered *in tandem* with the other factors we find persuasive in reducing sentence.

<sup>14</sup> Defendant's desire to obtain the death penalty is noteworthy only in that we find it impertinent to this or any review under

After argument and submission, this cause was assigned to me for opinion. That opinion, which is set forth above, was rejected by the majority of the Court.

I respectfully dissent.

WELLIVER, Judge, dissenting.

I respectfully dissent. The principal opinion treats this case as though it were here on appeal, which it is not, and in my opinion, glosses over our statutory duty to make examination as to proportionality of the sentence. § 565.035.3(3), RSMo 1986. I concur in the separate dissenting opinion of Blackmar, J. and the separate dissenting opinion of Donnelly, J.

The record before us is a documentary of defendant-"appellant's" exposure to and his failure to respond to almost every known social program of this society during the first almost seventeen years of his life. Regardless of the current belief of many that the death penalty is a deterrent to crime, utilization of the death penalty in cases such as this only serves to bury and cover up the failures of our existing social and penal programs. The death penalty was never intended to punish crimes committed by juveniles and is totally disproportionate to the punishment of similar crimes committed by those of similar age. See cases cited in separate opinions of Donnelly, J. and Blackmar, J. The punishment should be reduced to life imprisonment.

---

section 565.035. This Court will not permit a defendant to employ the judicial process as a vehicle for state-aided suicide.

CLERK OF THE SUPREME COURT

State of Missouri  
Post Office Box 150  
Jefferson City, Missouri  
65102

October 13, 1987

Ms. Janet M. Thompson  
Ms. Nancy A. McKerrow  
Office of State Public Defender  
209B East Green Meadows Road  
Columbia, Missouri 65203

Re: State of Missouri vs. Heath A. Wilkins,  
No. 68393

Dear Ms. Thompson and Ms. McKerrow:

This is to advise that the Court has this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled. Execution set for December 17, 1987."

Very truly yours,

/s/ Thomas [Illegible]  
Clerk

cc: Attorney General

SUPREME COURT OF THE UNITED STATES

---

No. 87-6026

HEATH A. WILKINS,  
*Petitioner*

v.

MISSOURI

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF  
THE STATE OF MISSOURI

---

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition. The case is set for oral argument in tandem with No. 87-5666, *Jose Martinez High v. Walter Zant, Warden*.

June 30, 1988



5

No. 87-6026

Supreme Court, U.S.  
**FILED**

SEP 3 1988

JOSEPH F. SPANIO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

HEATH A. WILKINS,

*Petitioner,*

v.

STATE OF MISSOURI,

*Respondent.*

On Writ Of Certiorari To The  
Supreme Court Of The  
State Of Missouri

**BRIEF OF PETITIONER**

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73 pp

**QUESTIONS PRESENTED**

Whether the infliction of the death penalty on an individual who was a child of 16 at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

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## OPINIONS BELOW

The opinion of the Missouri Supreme Court is published as *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987). The opinion is reproduced in the Joint Appendix.

Although there is no formal or reported trial court opinion, the Judgment and Sentence filed in the Circuit Court of Clay County, Missouri is set forth in the Joint Appendix.

Also set forth in the Joint Appendix is the Certification Order in which the Juvenile Court of Clay County, Case No. JU185-132J, relinquished jurisdiction to allow the prosecution of Petitioner as an adult.

## JURISDICTION

The Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1257(3). The opinion of the Missouri Supreme Court was entered on September 15, 1987. The Missouri Supreme Court denied a timely petition for rehearing on October 13, 1987. The petition for a writ of certiorari was filed on December 8, 1987 and this Court granted the petition for writ of certiorari on June 30, 1988.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend. XIV (excerpt):

"No State shall . . . deprive any person of life . . . without due process of law. . ."

## STATEMENT OF CASE

### I. Court Proceedings

Heath Allen Wilkins was 16 years old on July 27, 1985 when, in the late evening hours, he and Patrick Stevens



entered Linda's Liquors in Avondale, Clay County, Missouri, and robbed it (Tr. 129-130).<sup>1</sup> In the course of the robbery, appellant stabbed the clerk, Nancy Allen, who died from her wounds (Tr. 124, 130; J.A. 79). Earlier in the evening, Heath had ingested a quantity of alcohol and, within four hours of the murder, had taken a "hit" of LSD, the last of three hits taken that day (Tr. 254; J.A. 35). Heath was apprehended fourteen days later, on August 10, 1985 (J.A. 83).

Because Heath Wilkins, a child in Missouri,<sup>2</sup> had committed an act which violated state law, the juvenile court had exclusive original jurisdiction over him. Mo. Rev. Stat. § 211.031.1(3) (1986). On August 15, 1985, the juvenile officer moved, pursuant to Mo. Rev. Stat. § 211.071.1 (Supp. 1984), to have "the petition heretofore filed in the interest of the juvenile" dismissed (J.A. 4), thereby permitting Heath to be tried as an adult. After "receiving testimony and other evidence", the juvenile court granted the motion, (J.A. 4-6) finding, in relevant part, that:

In light of the facts, it is reasonable to conclude from a practical standpoint that only 17 months of rehabilitative confinement or treatment are available and that based upon the crime and the juvenile's present circumstances, such a period is not adequate to rehabilitate him and to protect society from him.

(J.A. 4). Heath was then charged by information with first degree murder,<sup>3</sup> armed criminal action,<sup>4</sup> and unlawful use of a weapon<sup>5</sup> (J.A. 2-3).

<sup>1</sup> Heath's girlfriend, Marjorie Filipiak, and another friend, Ray Thompson were aware of and involved in the robbery plan but neither was present at the scene (J.A. 81).

<sup>2</sup> A child is any person under seventeen years of age. Mo. Rev. Stat. § 211.021 (1986).

<sup>3</sup> Mo. Rev. Stat. § 565.020.1 (Supp. 1984)

<sup>4</sup> Mo. Rev. Stat. § 571.015 (Supp. 1984)

<sup>5</sup> Mo. Rev. Stat. § 571.060 (Supp. 1984)

On October 17, 1985, Heath entered pleas of not guilty and not guilty by reason of mental disease or defect excluding responsibility (J.A. 1). The circuit court ordered that he be examined to determine his competency to stand trial.<sup>6</sup> At defense counsel's request, the court ordered a second psychiatric evaluation (Tr. 5).

A competency hearing was held on April 16, 1986 (J.A. 1). Dr. Steven Mandracchia, a clinical psychologist for the State of Missouri, Department of Mental Health, testified that he saw Heath Wilkins on November 27, 1985 (Tr. 9), and estimated that he spent approximately one hour and thirty-five minutes with him (Tr. 9). A member of Mandracchia's staff administered the Minnesota Multiphasic Personality Inventory (Tr. 9). No other psychological testing was done, and no physical examination was performed (Tr. 10).

Mandracchia testified that in his opinion Heath was not suffering from "mental disease or defect as defined by Chapter 552 of the Revised Statutes of the State of Missouri" (Tr. 11).<sup>7</sup> Mandracchia would not state an opinion as to mental illness beyond the parameters of the statute (Tr. 11). Mandracchia was not aware of Heath's desire to seek the death penalty when he interviewed him in November

<sup>6</sup> Mo. Rev. Stat. § 552.020 (Supp. 1984)

<sup>7</sup> Mo. Rev. Stat. § 552.010 (1986). Mental disease or defect defined. —The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo. nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770, RSMo.

(Tr. 12). Nonetheless, he was unequivocal in his opinion that Heath Wilkins was competent to proceed (Tr. 12), and competent to make the decision to plead guilty in order to seek the death penalty (Tr. 14-15).

Dr. William S. Logan, psychiatrist and director of law and psychiatry at the Menninger Foundation in Topeka, Kansas, testified based on a five hour interview he conducted with Heath on March 20, 1986 (Tr. 17). Dr. Melvin Berg, an associate of Logan's, administered six hours of psychological examinations including the Thematic Apperception Test, the Rorschach Test, the Animal Choice Test, and an intelligence test, the Wechsler Adult Intelligence Scale, Revised (Tr. 17). Dr. Logan did not wish to provide a definite conclusion concerning the legal standard of competency to stand trial (Tr. 19). He set before the judge his view that Heath Wilkins had adequate cognitive skills to proceed (Tr. 19), but was "psychiatrically ill" with emotional problems which impaired his judgment, but not the extent that he was totally out of touch with reality (Tr. 32). He left it to the judge to determine whether, under those circumstances, Wilkins was competent to proceed (Tr. 22-23).

Logan was also questioned about Heath's desire to be put to death (Tr. 30-37). When asked by the prosecutor if Heath's decision was logical, the following colloquy took place:

A. The distinction, I suppose, becomes one of whether it's a rational decision. And that I will leave to wiser souls than I. But, it makes sense on the surface of it if viewed from the one perspective.

Q. Okay. In other words he'd rather spend as little time in prison as possible and take the death penalty and not go through what he thinks would be the torture of life in prison, is that, is that kinda the bottom line?

A. Roughly, yes, with the additional component that I do not believe he has a very good understanding of the fact that even if he were to take the route he would still spend a considerable amount of time in terms of years on death row.

He seemed to expect that the sentence would be rather, administered rather quickly and would not involve a lot of waiting.

Q. Well, that may or may not be, you know, we don't know how many years.

A. But it won't be done next month. I believe that was more of the term he was thinking of.

(Tr. 31-32).

The circuit court found Wilkins competent to proceed (Tr. 42). Immediately thereafter, Fred Duchardt, Heath's attorney, informed the court that Heath wanted him to withdraw as counsel so that he could proceed *pro se* (Tr. 42), making it clear that Heath wanted to plead guilty in order to seek the death penalty (Tr. 42). The court then questioned Heath as to his age (17); his education (ninth grade); and his legal knowledge (none) (Tr. 44). The judge ordered Heath to think about his decision for one week, stating, ". . . you are a young man. You have a lot of years ahead of you." (Tr. 59).

One week later, the court accepted Heath's waiver of counsel (Tr. 84), and permitted his attorney to withdraw.<sup>8</sup> Heath then informed the court that he wanted to plead guilty to all charges (Tr. 90). After again explaining all of the legal rights he would be waiving (Tr. 90-93), the court informed him that it was "quite likely," if he persisted in seeking the death penalty, he would get it (Tr. 93). The court also gave him what was intended to be a frightening

<sup>8</sup> Fred Duchardt was ordered to remain available for consultation (Tr. 87-88).



description of death by lethal gas and strongly suggested that he change his mind (Tr. 94). Heath reiterated his desire to plead guilty and the judge set the guilty plea hearing for two weeks later (Tr. 95).

On May 9, 1986, the hearing to accept the plea was held. The guilty plea forms for each charge were reviewed (Tr. 10).<sup>9</sup> The court engaged in a colloquy with Heath concerning the rights being waived (Tr. 116-124). Heath presented a truncated version of the offense, which was then expanded by the prosecutor and adopted by Heath (Tr. 124-131). The court again reviewed the rights being waived by the plea, and asked if there was any information other than that contained in the reports on competency (Tr. 135). Mr. Duchardt informed the court that there was a considerable amount of additional information, from inpatient mental health diagnostic and treatment centers where Heath had been confined during his childhood, and additional information in juvenile court records (Tr. 136-37). The court noted that it had heard the testimony of Drs. Mandracchia and Logan on April 16th and had found Heath competent at that time. After establishing that Heath "agreed with the recommendation and with the opinions of the doctors that [he was] competent to proceed" (Tr. 137), and that Heath still believed himself competent (Tr. 138), the court accepted Heath's plea of guilty to the class A felony of murder in the first degree (Tr. 144).

At the sentencing hearing on June 27, 1986 (J.A. 1), the court encouraged Heath to change his mind about self-

<sup>9</sup> Mr. Duchardt noted that Heath's only consultation with him since the last hearing concerned how to answer a question on a waiver form relating to mental illness (Tr. 106). Paragraph 17 states: "I have not in the past suffered from any mental disease or illness and have never been treated by a doctor or psychiatrist for a mental or emotional condition other than: \_\_\_\_." Mr. Duchardt had advised Heath just to refer to the reports already before the court (Tr. 106).

representation (Tr. 189-190). Heath made it clear that his ignorance of the law was of no consequence since he did not want to "make a defense" (Tr. 190).

The State presented evidence at the sentencing hearing concerning the circumstances of the offense. Photographs of the victim and the crime scene were offered and admitted (Tr. 194-213), a police officer read Heath's inculpatory statement taken the date of his arrest (Tr. 214-228), and the victim's husband testified as to ownership of the establishment and the amount of missing money (Tr. 231), all without objection.

The State then presented a chronology of Heath's prior involvement with state agencies and the juvenile court system (Tr. 234-37). Heath sat patiently until the witness began to describe the specific mental health facilities to which he had been remanded. He then objected, stating

Those years back, on my childhood, I've grown up. I can understand some technicalities and stuff from my mental records and everything . . . I just don't see how those technicalities, those things in my background and all of that has to do with helping make the decision.

(Tr. 237). The objection was sustained. Similar objections to potentially mitigating evidence were sustained throughout the remainder of the hearing (Tr. 241, 260, 269).

The State then called Dr. Logan, who testified to Heath's statement to him concerning the homicide. He testified without objection until reaching the point at which the victim was stabbed. Heath then objected that the prosecutor was reviewing the issue of guilt, which had already been decided. The objection was sustained (Tr. 260). Dr. Logan finished his testimony by describing Heath's background. He was asked by the prosecutor whether Heath committed the crime while under the



influence of extreme mental or emotional disturbance,<sup>10</sup> and he opined that Heath had been emotionally disturbed (Tr. 272-73).

In closing statements, both the prosecutor and Heath asked that the death penalty be imposed (Tr. 289-98).<sup>11</sup>

<sup>10</sup> Mo. Rev. Stat. § 565.032.3 (Supp. 1984) lists as a mitigating factor: "(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance."

<sup>11</sup> Heath's statements concerning his desire to receive the death penalty throughout the proceedings were somewhat muddled. At the start of the sentencing hearing he was asked when he had decided he wanted to receive the death penalty. He stated: "I'm, I'm telling you, you know, I never stated flat out that I want the death penalty . . . I stated that I would prefer the death penalty over spending life in prison, you know." (Tr. 186-87).

In his closing argument, the following exchange took place:

. . . What I would like for you to look at and take into consideration is for capital murder, murder in the first degree, it's either life imprisonment or, life imprisonment without possible probation or parole or any other type of release, and the death penalty.

Now, I'd say this is more based on personal observation than anything, that I'm asking the court to consider the death penalty as a more humane in the extent of possible happenings and pain received by, you know, me, what I'd go through, either one.

Not that I'd, I'm not stating that I would deserve it, I'm just, that's my personal feelings.

One I fear, the other I don't.

That's all.

The Court: I want to make sure I understand you, are you requesting that the court impose one or the other?

Defendant: Yes, Your Honor.

The Court: Which?

Defendant: I'm asking the Court to impose preferably the death penalty over life imprisonment without—

(Tr. 295-96).

\* \* \*

Now I've seen—I would say that I just feel, I've seen how people react concealed, you know, when you're contained in small

The judge imposed the death penalty, finding two aggravating circumstances: 1) the murder was committed during a robbery;<sup>12</sup> and 2) "the murder involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman." (Tr. 300-301).<sup>13</sup> The judge did not specify mitigating circumstances considered or found.

Heath did not take any of the steps necessary under Missouri law to appeal his conviction and sentence. The Missouri Supreme Court ordered the State Public Defender to enter the case as *Amicus Curiae* and to brief and argue "any issue subject to review." (J.A. 80). Heath was allowed to appear before the Supreme Court and make a statement. After hearing his statement and the argument by *Amicus*, the Missouri Supreme Court ordered that Heath be evaluated as to his competence to waive his right to counsel on appeal (J.A. 80).

The psychiatrist who conducted the competency examination, Dr. S. D. Parwatarikar, found that Heath "was not competent to waive his constitutional rights and repre-

things I know how people react.

And I know I don't like that. And that, I've seen what it has done to people and how it makes people feel, firsthand experience, plus I've seen observations on the impact of others.

Now, I'm not saying it's always bad, but I've just seen it. And I'd say I'd rather have a punishment that leaves no scars on myself, you know.

\* \* \*

Either way, you know, the end is going to be the same, just one I'm gonna die slower until it satisfies or it's in the opportunity for others, for what makes it convenient for them.

Either way the end is gonna be the same, I'm just asking for it this particular way, that's all (Tr. 297-98).

<sup>12</sup> Mo. Rev. Stat. § 565.032.2(11) (Supp. 1984): "The murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery."

<sup>13</sup> Mo. Rev. Stat. § 565.032.2(7) (Supp. 1984).

sent himself in front of the court." (J.A. 74). Counsel was then appointed to represent Heath and the case was briefed and argued again (J.A. 80).

On September 15, 1987, the Missouri Supreme Court affirmed the conviction and death sentence in a 4-3 decision. Although counsel had asked the Court to find that the death sentence was cruel and unusual and therefore unconstitutional under the Eighth and Fourteenth Amendments because Heath was only 16 years old (Appellant's Brief at 62-73), the Court did not address the issue. The Court instead held that it had "repeatedly rejected constitutional challenges to Missouri's death penalty provisions" . . . and that the "Supreme Court of the United States has held that the death penalty is not *per se* cruel and unusual punishment prohibited by the Eighth Amendment." (J.A. 88).

## II. Heath Wilkins' Development And Background

Heath Wilkins was born on January 7, 1969, to Sherry Wilkins, who was nineteen years old at the time (CC 129).<sup>14</sup> Heath was her second child. Her older son, Jarrod, had been born two years earlier while she was still in high school (J.A. 39).

His father left the home when Heath was three or four years old. During his time in the home, Mr. Wilkins had been arrested for physically abusing Sherry Wilkins (P.P.R. 4).<sup>15</sup> After his parents divorced in 1972, his father was committed to a mental institution in Arkansas. Heath had no contact with him after 1974 (P.P.R. 4).

<sup>14</sup> Reports from the Crittendon Center are part of the record and will be denominated CC throughout.

<sup>15</sup> The Probation and Parole Report is a part of the record and will be denominated P.P.R. throughout.

Heath's mother had little idea of how to provide an environment in which a child could thrive and mature. She herself had been raised by an alcoholic father who "probably physically and sexually abused her." (J.A. 39). Her notion of discipline was to put the boys in a room by themselves with a piece of tape on the door. If the tape was broken when she checked it, she would beat them, sometimes for as long as two hours (J.A. 57). She used drugs and kept drugs around the house (J.A. 42). She worked nights and slept during the day, leaving Heath and Jarrod with a baby-sitter who sexually fondled Heath (J.A. 29; Tr. 261) and used drugs in his presence (Tr. 261). Mrs. Wilkins had a live-in boyfriend who had a quick temper and would slap Heath for the smallest reason, like walking in front of the television set when the boyfriend was watching it (J.A. 29). Heath's mother would side with the boyfriend when such incidents occurred (J.A. 57-58). Heath ran away several times, and by age ten was sleeping with a knife hidden under his mattress (J.A. 39).

Heath's closest relationship was with his mother's brother, with whom he stayed during the summer. When Heath was in kindergarten this uncle introduced him to marijuana. His mother and uncle joked about this (J.A. 29). His uncle also taught him how to shoot guns (J.A. 29). By age seven, Heath was setting fires and robbing houses (P.P. R. 5).

Heath first came to the attention of the authorities when he was eight years old, for wrecking a tractor (Tr. 234). He was given a warning and released to his mother's care (*Id.*) A year later he broke into a house with some other children and stole money (*Id.*). Again, he was given a warning and released to his mother's care. A year later, he broke into a store to steal money, this time with his brother Jarrod (Tr. 234).

Around this time, at age ten, it was learned that Heath had devised a plot to poison his mother and her abusive



boyfriend. He bought poison from a gardening store and tried it out on a neighborhood dog. The dog died. He then put the poison in Tylenol capsules (J.A. 29). Jarrod learned what he had done, and told his mother. Without telling Heath, his mother emptied the poison from the capsules and then made him eat them. Heath tried to induce vomiting by sticking a finger down his throat (J.A. 58). His mother and her boyfriend then beat him (*Id.*). When recalling why he had put poison in the capsules, Heath explained that he thought if his mother got sick, she would "break up" with the boyfriend (J.A. 29).

At the age of ten, Heath was referred to the Tri-County Mental Health Center by his mother under pressure by the Juvenile Court (J.A. 39). Heath was evaluated by mental health professionals, found to be in need of professional treatment, made a ward of the state until he was seventeen, and placed with the Division of Mental Health (Tr. 235). He remained in state custody—almost exclusively in mental health facilities—from age ten until shortly before the homicide (Tr. 234-36).

Jarrod was also institutionalized, at least as early as 1982 and possibly before (CC 48). Jarrod was found to be mentally ill, and was diagnosed as schizophrenic (J.A. 42).<sup>16</sup>

Heath's mother had difficulty accepting the fact that both her sons had "psychotic potential" (CC 106). She tended to minimize Heath's disabilities, and to resist

<sup>16</sup> As Dr. Logan noted, "The presence of substance abuse and mental illness in the patient's only sibling also raises questions about a genetic component to the patient's chronic behavior problems." (J.A. 47). Dr. Parwatikar noted that mental illness in both Heath's father and brother "presents a strong possibility of genetic predisposition to mental disorder which may have contributed to his distorted reasoning." (J.A. 74).

treatment for him, or remove herself from his treatment, as described more fully below.<sup>17</sup>

Interviews and psychological testing at the Tri-County Mental Health Center revealed that at age ten Heath was "highly conflicted emotionally with high anxiety and inner turmoil. This conflict stem[med] from the home environment." (J.A. 40). He was tearful and depressed, unhappy about "not receiving any attention from his mother" and "fantasized about a possible relationship with his father which does not exist." (J.A. 39). He openly talked about suicidal or homicidal acts. "The possibility of a thought disorder was considered because at times [his] . . . confusion approached paranoid ideation." (J.A. 40). It was recommended that he be hospitalized for intensive psychotherapy (*Id.*) He was transferred from Tri-County to the Western Missouri Mental Health Center, where he remained for a few weeks for additional testing and diagnosis. The findings and recommendations were consistent with the findings at Tri-County (J.A. 40).

In January, 1980, just after his eleventh birthday, Heath was transferred to the Butterfield Youth Services, a residential treatment facility for mentally disturbed children. He did not receive the intensive psychotherapy that had been recommended, but was engaged instead in "activities" therapies (art and recreation) and some individual counseling (J.A. 43), but "not with a highly skilled person" (Tr. 26). His family situation was never discussed, and his family was not involved in treatment (Tr. 27).

<sup>17</sup> Heath's mother admitted to the pre-sentence investigator that while Heath was growing up "she did not have time for [him] . . . because of her preoccupation with his older brother Jarrod. She admitted denying existence [sic] of serious problems with Heath even though they were pointed out by authorities at Butterfield and Crittenton." (J.A. 57).



Heath remained at Butterfield for three and one-half years, and during that time his behavior deteriorated (Tr. 28; J.A. 44). His I.Q. decreased by twenty points, most likely because of drug abuse, particularly the use of inhalants which are known to cause brain damage (Tr. 29). He also frequently smoked marijuana, some of which he grew himself (J.A. 30), and had his first experience with LSD, which he stole from another patient (Tr. 264; J.A. 30). While at Butterfield, he suffered from "stressed-induced headaches" (J.A. 41) and he was prescribed the anti-psychotic medication Mellaril<sup>18</sup> "for a disoriented thinking pattern and high anxiety." The prescribing psychiatrist was aware of Heath's drug abuse, but did not feel the disorientation could be attributed to drugs. He believed Heath might have a schizotypal personality or developing schizophrenia (J.A. 43).

Heath had frequent thoughts of suicide while at Butterfield and made three suicide attempts: once by cutting his wrist, and twice by attempting to overdose on prescribed or illicit drugs (J.A. 31).<sup>19</sup> Testing showed that he had a poor self-concept, lacked basic trust and was suspicious of authorities (J.A. 41). Heath himself "reported having a vivid imagination and suspected he might be 'crazy because of my thoughts.'" (J.A. 41). He made "bizarre derogatory sexual comments toward women prior to visits with his mother . . . . The mother was described as passive and did not talk to the patient." (*Id.*) For the last six months of 1981, his mother stopped all contact with

<sup>18</sup> Physician's Desk Reference 1870-71 (42 ed. 1988)

<sup>19</sup> At some point before his stay at Butterfield (the time is unclear from the record), Heath attempted suicide by jumping off a bridge into the path of an oncoming car. The car swerved and missed him. "He described in vivid detail he had imagined that the impact would break his legs, throw him over the hood, the windshield, and then onto the pavement." (J.A. 31).

him, and he began to further deteriorate. He "with[drew] into a fantasy life and was suspicious of adults and peers." (J.A. 42). He sought excitement "through drugs and hyperventilating." (*Id.*)

Heath was allowed home visits in 1982. It was later learned that his mother had drugs in the home and that Heath brought drugs back to the institution after these visits (J.A. 43). He was suspended from the eighth grade for fighting with another student and because he engaged in "bizarre" behavior (J.A. 43).

In May, 1983 (J.A. 44), Heath was transferred to the Crittendon Center in an attempt to gain some family involvement and increase his motivation (J.A. 44).<sup>20</sup> During the first few months of his stay, he isolated himself from the program and exhibited "bizarre" behavior and thought processes (CC 91), including paranoid ideation (CC 93).<sup>21</sup> He was referred for psychological testing because "staff feared that a decompensation might be imminent. From time to time he has expressed unusual ideas, suspicious attitudes, and unpredictable behaviors that lead people to wonder whether there might be a psychotic organization behind his rather cautious and composed exterior." (CC 50). The treating psychiatrist initially prescribed thorazine, a powerful anti-psychotic drug<sup>22</sup> (CC 80, 81). After two months, Mellaril was prescribed (CC 81). The staff consistently resisted Heath's return to his mother's custody, but he was allowed home

<sup>20</sup> His brother Jarrod was at Crittendon at this time.

<sup>21</sup> For example, on an outing to a zoo, Heath accidentally bumped into a woman. He "then felt this woman and a whole group of people walking [with] her were staring at him. Also some of his conversation . . . [with the writer of the report] was fragmented and didn't make sense." (CC 94).

<sup>22</sup> Physician's Desk Reference 2036-39 (42 ed. 1988)

visits.<sup>23</sup> His discharge was delayed, and it was recommended that he be sent to a group home instead (CC 116).<sup>24</sup>

A progress report by the treating psychiatrist one month before Heath's release found that he was emotionally isolated, reacted impulsively, immaturely, and in a self-centered, selfish manner (CC 70). A treatment review around the same period of time reported that he functioned "best in situations where he experiences a considerable amount of structure and guidance from the staff and, in fact operate[d] best in those situations with staff individuals whom he ha[d] thoroughly tested and whose limits he [knew to be] . . . consistent." (CC 75).

The staff at Crittendon also had concerns about Heath's potential for violence, reflected in psychological tests and his own strange statements to them<sup>25</sup> (CC 102). He was

<sup>23</sup> On his final visit, after the court had ordered imminent release to his mother's custody, Heath arranged for a number of his friends who were also released for visits to have a party together. "[D]uring the time that he and his peers [were] together unsupervised on pass, he was involved in drinking and was totally unsupervised by his mother. On return from the pass the mother indicated to Crittendon staff that Heath had gone hunting while he was on his pass and seemed to be in a very good mood and cooperated quite well with her during the pass." (CC 77).

<sup>24</sup> Heath's feelings about his home environment were reflected in his reaction to being told that he might be sent to a group home instead of being returned to his mother upon his release from Crittendon. He did not show "anger or resentment" at the idea, but said he felt that "the discipline and the structure of restrictions will not be too different in either situation." (CC 69). Love, support and nurturance are all noticeably absent from his equation.

<sup>25</sup> "7/11 Heath spent a lot of time talking about violence today. The conversation started with talking about various movies he had seen. All of the scenes he described were of extremely violent content but Heath didn't define them as violent. He only considered an incident violent if torture

found to have potential for both destructive and self-destructive action (CC 51).

In November, 1983, the court ordered that Heath be released to his mother's home on condition that he participate in outpatient counseling and drug screening, and put him on probation (J.A. 44). Heath "really had no kind of supervision or tutoring or guidance in terms of how to use his mind to make rational, common sense decisions." (Tr. 24). He was impulsive and did not think through the consequences of his decisions (Tr. 22), and was very easily frustrated (Tr. 25). Within five months he was caught violating probation and possessing marijuana, breaking into a house and stealing (Tr. 235). The court allowed him to stay with his mother (Tr. 236). Two months later he again violated probation by running away to California (Tr. 266). Upon his return, he was remanded to the Division of Youth Services and placed in the Northwest Regional Zone facility, the most structured available, where he stayed for six or seven months (Tr. 236). Thorazine was again prescribed (J.A. 32, 59), but he claimed he only took it when he was "stoned," resisting it because it was the medication Jarrod took (J.A. 32).

Heath was released from the Northwest facility to foster care (Tr. 236). He ran away from his foster parents and lived in a friend's basement for two months (J.A. 59). In 1985, the State relinquished custody of him after he offered to join the Job Corps in Utah. He stayed in Utah for one week before returning to Kansas City (J.A. 33).

was involved. For example, he didn't consider a person's chest being instantaneously blown apart violent because the person didn't suffer. He said that the only thing that bothered him about killing people was all the things they would miss out on.

(CC 96). Heath's description of the stabbing of Nancy Allen to one psychiatrist was that he "stabbed [the victim] several times, it caused no pain and came automatically." (J.A. 37).



At first "[h]e viewed his return to Kansas City as an 'opportunity for a new start and determined to go straight'" (J.A. 9). However, his mother failed to relay calls about employment (J.A. 33) and because he was "devoid of skills or ability to modulate his emotions, he quickly fell vulnerable to frustration, despondency, and emptiness to which he responded by resorting to the established pattern of impulsive thrill seeking, drug consumption and thefts" (J.A. 49). Because his mother refused to allow him to live in her home (P.P. R. 5), Heath lived "on the streets" from May of 1985 until the time of his arrest in August, 1985. He slept in the park (J.A. 33). His drug abuse increased, particularly his use of "acid" (LSD), his favorite drug (Tr. 253; J.A. 33). His drug and alcohol use became "a fairly continuous thing" (Tr. 253).

Living on the streets, Heath and his friends would steal alcohol and drink together in the evenings, playing a game where they would throw knives at each other's feet (J.A. 35). Although he now had a girlfriend, his only true human connection, "he recalled he could not stand to be touched" (J.A. 35).

The report of the psychologist who tested Heath in April, 1986, described Heath's thought processes and emotional state several months after the homicide, after he had turned seventeen. While his I.Q. was average, the tests showed "a pattern of abilities and deficits suggestive of an impulsive cognitive style which avoids careful reflection in favor of immediate action . . . [H]e demonstrates a disinterest or inability to sustain logical and stepwise problem-solving efforts in situations calling for careful and deliberative thought" (J.A. 16). Heath had an "inaccurate, vague and midly distorted understanding of social conventions and the rationale for how and why social mores and customs are established" (J.A. 17).

Particularly when stirred by feelings, his thinking becomes temporarily disorganized and permeated by

highly personalized fantasies which temporarily push him toward the outer limits of what is commonly accepted as reality and good sense. When depressive or angry affects are aroused, his thinking deteriorates, becomes diffuse, and so dominated by feeling that his thoughts then function more as a form of emotional discharge than as a rational means of understanding reality and coming to grips with problems.

(J.A. 18).

The psychologist noted that Heath has "little trust in others from whom he expects primarily indifference or destructive attack" (J.A. 20), although he detected an "incipient potential for attachment and concern which leaves him vulnerable to feelings of loss and longing" (J.A. 20). Heath's vulnerability to being overwhelmed by feelings of rage and despair had predictable results.

### III. The Robbery And Murder

Heath spent the day of the murder in the park or mall with his friends. "He did not think about the future as he lived on a day-to-day basis" (J.A. 34). He had taken LSD about three times that day (J.A. 59). The last "hit" had been at 7:30 or 8:00 p.m. (J.A. 35). He had also been drinking fairly heavily (Tr. 254). He felt himself becoming violent, threatened one of his friends with a knife for talking to his girlfriend and pushed him down. Another friend told him to "cool down" and took the knife away from him "as they had a job to do that night" (J.A. 35).

The robbery was carefully planned, in that Heath and his three friends took separate cabs to a hospital not far from the store they planned to rob (Tr. 220), brought changes of clothes (Tr. 129), waited for customers to leave before entering the store (Tr. 221), and wiped their shoes to avoid leaving footprints (J.A. 36). In some versions of his story about the homicide, Heath contended that it,



too, was planned because he did not want to leave witnesses (Tr. 126, 128). In other versions, he "described that it was almost 'instant anger.' He saw his actions as stupid but was 'consumed.' He realized his actions did not make sense and could think of no plausible reason for his action when questioned why it was necessary to kill the woman" (J.A. 37).<sup>26</sup> Dr. Logan characterized the homicide as "the rageful, impulsive enactment of a fantasized crime by one responding to his own hopelessness, rage, and frustration. Only after the act did the patient realize the full consequences of his behavior . . . . His crime seems committed as much out of realization of the deadness of his own life as out of malevolence" (J.A. 49-50). The trial judge did not find the "witness elimination" aggravating circumstance argued by the prosecution (Tr. 292).<sup>27</sup>

According to the evidence at the hearing on the plea and at sentencing, shortly after Heath and his friend "Bo" entered the store, Bo went to the bathroom and Heath asked Nancy Allen to make him a sandwich (Tr. 129). As

<sup>26</sup> Heath initially told the police a story consistent with his paranoia, which was that he believed the victim made fun of him, and he was going to get back at her (Tr. 219). He later claimed that he made the statement to "play" crazy, but decided better of it when he thought about returning to a mental institution (J.A. 36).

At the last psychiatric interview, while trying to waive counsel for his appeal, he denied any intention before the robbery to hurt anybody (J.A. 62). He also "recalled that his experiences (at the mental institutions) were rather horrifying. [He] dwelled rather extensively at his experiences at being put in a straightjacket and being 'pumped up with thorazine,' causing him to feel like a 'zombie'" (J.A. 62). He also alluded tangentially to sexual abuse he suffered at one of the institutions where he resided, although it is not clear which one (J.A. 62).

<sup>27</sup> Mo. Rev. Stat. § 565.032.2(12) (Supp. 1984): The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness.

she was making the sandwich, Bo came out from the bathroom and grabbed her, while Heath stabbed her. Bo took some merchandise and money, and asked a question, which Ms. Allen answered (Tr. 226). Heath began to stab her again, "to shut her up" knowing she would die from the wounds (Tr. 130). She had been stabbed a total of eight times, once in the back, four times in the neck, and three times in the chest (Tr. 202).

After the crime, Heath and Bo returned to the other two friends waiting at the hospital, took cabs to the bus station and split the money (Tr. 130). Heath and his girlfriend went to the video arcade to play (J.A. 38), and then returned to the park, where they took more "acid" (Tr. 223). "It was Sunday night before he realized what he had done" (J.A. 38). When he heard Bo bragging about the robbery, he realized they would get caught but despite the urging of his girlfriend, decided not to run away because "[i]t didn't matter anymore. I didn't care." He decided just to get 'wasted.' He told his girlfriend to go home and he 'stayed stoned.'" (J.A. 38). When the police came to arrest him, he said "he had thought about crying but was silent because he realized there was no one to help him" (J.A. 38).

#### SUMMARY OF THE ARGUMENT

In this case, the Court is asked to determine whether death is a disproportionate sentence not for those children who are exceptional for their maturity and good judgment, but for those who are exceptional because they lack even the immature judgment and limited self-control of the average 16-year-old.

The Eighth Amendment stands to assure that the State's power to punish is "exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). In determining what those civilized standards are,

this Court must look to the objective evidence of society's judgment, including legislative enactments, jury verdicts, and the position of respected organizations and religious leaders. *Thompson v. Oklahoma*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2687, 2691-92 (1988).

American society treats children differently than adults in a multitude of areas. This differential treatment is based on the recognition that children are peculiarly vulnerable, incapable of mature decision-making, and are still dependent on parents or guardians for care and guidance.

Society's judgment that children should be treated differently than adults includes the issue of capital punishment. Thirty-one states, or almost two-thirds of the country, would not permit the execution of an offender who committed his crime at, or below, the age of 16. In those jurisdictions which do not prohibit the practice, juries and prosecutors reflect this judgment by refusing to utilize the death penalty as punishment for 16-year-olds.

Had Heath Wilkins not asked to be sentenced to death, it is extremely unlikely that he would now be on death row. He is one of 16 offenders who have been charged with a capital offense in Missouri at the age of 16 or younger and certified to be tried as an adult since 1977. He is the only one sentenced to death.

Missouri's experience is not unique. There has been a dramatic decline in the number of people on death row for crimes committed while 16 or younger. None of the seven 16-year-olds currently on death row was sentenced to death in a state which has "rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of [17] at the time of the offense." *Thompson*, 108 S.Ct. at 2707 (O'Connor, J., concurring).

Additional evidence of a national consensus against executing 16-year-olds can be found in the opinions of American citizens, respected professional groups involved with our legal system, and the moral arbiters of society, the nation's religious leadership. Finally, evidence exists that the international community disapproves of the execution of 16-year-old children.

This Court should add its own informed judgment to the pervasive consensus evidenced by these objective standards, that the execution of any person for a crime committed before the age of 17 offends our current standards of decency.

A punishment is unconstitutionally excessive if "it makes no measurable contribution to acceptable goals of punishment." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). The two legitimate penological goals served by the death penalty are retribution and deterrence, *Gregg v. Georgia*, 428 U.S. 153 (1976), neither of which would be served by the execution of 16-year-old offenders.

Retribution can only be served if the community feels that an offender has gotten what he deserves for the harm he inflicts. What an offender "deserves," depends on an assessment of that offender's moral culpability.

Sixteen-year-olds lack the capacity to truly understand the nature and consequences of their actions. True understanding comes from experience and maturity, attributes not found in 16-year-olds. Nor do 16-year-olds have the same capacity as adults to understand and control their emotions and impulses. A person who is responding to impulses beyond his control has traditionally been viewed as less culpable than the cold-blooded, rational criminal. See *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). Finally, because 16-year-olds are still of an age to require parental control, parents and/or guardians are to some extent responsible



for harm inflicted by the child. Youth crime should be viewed as a failure of the family and society. This is especially true of juveniles who commit murder, who share a common background of inadequate supervision, parental brutality, neglect, and severe psychopathology.

Retribution is not served by the execution of 16-year-old offenders who do not share with adults the capacity for mature judgment and control of behavior.

Deterrence is not served by the execution of 16-year-old offenders because 16-year-olds, as a class: 1) do not contemplate the consequences of their actions; and 2) do not fear death. Any potential deterrent effect the death penalty might have for 16-year-olds is completely negated by the infrequency of its use.

Even if this Court were to decide that the execution of those who committed their crimes while under the age of 17 is not *per se* cruel and unusual punishment, the execution of Heath Wilkins would violate the Eighth and Fourteenth Amendments. In sentencing him to death, the State of Missouri failed to carefully consider his age, maturity or moral responsibility.

The statutory mechanism utilized to transfer Heath Wilkins from juvenile court to the court of general jurisdiction did not involve an assessment of maturity. All that was required was a finding that Heath Wilkins had committed a very serious offense, and that the juvenile court system did not have the capacity to respond adequately.

Once transferred to the court of general jurisdiction, Heath Wilkins was considered and treated as an adult. Age was irrelevant to the circuit court's determination that Heath was competent to represent himself and plead guilty. The court and the prosecutor either ignored or failed to recognize evidence of Heath's immaturity. No individualized consideration of Heath Wilkins' age, matu-

rity or moral responsibility was possible because no one involved in the process had any interest in seeing that they were considered. Finally, the Missouri Supreme Court made it clear that because Heath Wilkins had been found mentally competent, his age at the time of the offense was irrelevant.

Heath Wilkins typifies adolescents who commit murder. He shares all of the characteristics: physical abuse, impulsivity, and severe psychopathology, found to exist in juveniles sentenced to death in this country.

The execution of Heath Wilkins would be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

## ARGUMENT

### I. INTRODUCTION

We have all met exceptional children who, at age 16, strike us as fully mature people with good judgment. When we encounter such a child, we tend to remark upon it because of the very fact that such a child is exceptional. Heath Wilkins was not such an exceptionally mature child. Based on experience and study, we can also safely say that none of the children who commit first degree murders are such exceptionally mature children. In this case, the Court is asked to determine whether death is a disproportionate sentence not for those children who are exceptional for their maturity and good judgment, but for those who are exceptional because they lack even the immature judgment and limited self-control of the average 16-year-old.

The Eighth Amendment forbids the imposition of cruel and unusual punishment.<sup>28</sup> U.S. Const., Amend. VIII.

<sup>28</sup> The Eighth Amendment's ban on cruel and unusual punishment is applicable to the states through the due process clause of the Fourteenth Amendment. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).



"While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). What these civilized standards are at any given time in history must be determined by the Court, whose judgment must be "informed by objective standards to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). The Courts inquiry into societal standards of decency is one which examines the judgment of society as expressed in the accumulation of legislative enactments, jury verdicts, the position of respected organizations and religious leaders, and other available data. See, *Thompson v. Oklahoma*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2687 (1988). Petitioner submits that an examination of the objective criteria in this case will lead to the conclusion that death is a cruel and unusual punishment for a 16-year-old.

## II. IN ALL IMPORTANT RESPECTS, 16-YEAR-OLDS ARE CONSIDERED BY CIVILIZED SOCIETY TO BE CHILDREN WHO LACK THE CAPACITY FOR MATURE JUDGMENT AND RESPONSIBILITIES

As American society has matured, so has its attitude toward children, especially those who commit crime. The punitive, retributive model of English common law has been replaced by a system which operates on the belief that young offenders "should be rehabilitated rather than punished," see Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology 1471, 1473-1475 (1983). Society's evolving attitude toward children who commit crime is amply illustrated by the fact that juvenile courts, in which children are treated and rehabilitated rather than punished, did not exist one hundred years ago. *In re Gault*, 387 U.S. 1, 14 (1967). Despite criticism of the juvenile court system, no one has argued that the ideal which spawned it should be abandoned.

The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment.

*McKeiver v. Pennsylvania* 403 U.S. 528, 545-546 n. 6 (1971), quoting the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *Juvenile Delinquency and Youth Crime* 7-9 (1967).

The Court has consistently recognized the State's right to treat children as a class differently than adults, noting that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . ." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). In *Bellotti v. Baird*, 443 U.S. 622 (1979), this Court "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634. As the plurality in *Thompson* noted:

It would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment.

*Thompson*, 108 S.Ct. 2693 n. 23 (plurality opinion). Indeed, the irony would be particularly striking if the existence of a few exceptionally mature 16-year-olds—who themselves would not be subject to capital punish-

ment—deprived the rest of the class of 16-year-old children of Eighth Amendment protection, when those few mature children are not permitted to evade class treatment where expansion of their rights is concerned.

The States treat children differently from adults in a multitude of areas. In Missouri, for example, there are more than 80 statutes which regulate conduct based on age. (See Appendix H). These statutes regulate every aspect of a 16-year-old child's life, from his inability to buy cigarettes,<sup>29</sup> to his ineligibility to vote.<sup>30</sup> Heath Wilkins could not have been an ambulance driver,<sup>31</sup> or a school bus driver,<sup>32</sup> in Missouri. He could not have bought a lottery ticket,<sup>33</sup> gone to the races,<sup>34</sup> or had a beer.<sup>35</sup> Heath Wilkins did not have the right to sue, or be sued,<sup>36</sup> or to control his own money.<sup>37</sup> Most ironically, Heath Wilkins could not, because of his age, sit on a jury<sup>38</sup> or witness an execution in the State of Missouri.<sup>39</sup> And yet, because the Missouri legislature has not expressly set a minimum age for capital punishment, Heath Wilkins can be put to death for a murder he committed at the age of 16.

Other states impose similar restrictions. As was true for the 15-year-olds discussed in *Thompson*, in no State

may a 16-year-old vote or serve on a jury. *Thompson v. Oklahoma*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2687, 2701-02 (1988), Appendices A and B. "[I]n all but four States a [16]-year-old may not marry without parental consent," and, in those states that have legislated on the subject, only two permit someone under the age of [17] to purchase pornographic materials. *Id.* at 2693, citing Appendices D, E and F. In fact, the only activity for which a number of states differentiate between 15-year-olds and 16-year-olds, is the right to drive without parental consent. *Thompson*, 108 S.Ct. at 2703-04, Appendix C.

As this Court noted in *Thompson*, our society's judgment that children are to be treated differently than adults extends to the issue of capital punishment. Eighteen states expressly set a minimum age for infliction of a death sentence. (See Appendix A). Fifteen of the eighteen prohibit the execution of anyone as young as 16.<sup>40</sup> Fourteen additional jurisdictions prohibit the death penalty in all cases,<sup>41</sup> and two more have statutes on the books but do not, or cannot, prosecute capitally.<sup>42</sup> Thus, thirty-one states, or almost two-thirds of the country, would not permit the execution of 16-year-olds.<sup>43</sup>

<sup>29</sup> Mo. Rev. Stat. § 71.740 (1986)

<sup>30</sup> Mo. Rev. Stat. § 115.133 (1986)

<sup>31</sup> Mo. Rev. Stat. § 190.145.2(1) (1986)

<sup>32</sup> Mo. Rev. Stat. § 302.272.1(2) (1986)

<sup>33</sup> Mo. Rev. Stat. § 313.280 (1986)

<sup>34</sup> Mo. Rev. Stat. § 313.670 (1986)

<sup>35</sup> Mo. Rev. Stat. § 311.310 (1986)

<sup>36</sup> Mo. Rev. Stat. § 507.110 (1986)

<sup>37</sup> Mo. Rev. Stat. §§ 404.007, 442.035 (1986)

<sup>38</sup> Mo. Rev. Stat. § 494.010 (1986)

<sup>39</sup> Mo. Rev. Stat. § 546.740 (1986)

<sup>40</sup> Only Indiana, Kentucky and Nevada set the age at 16.

<sup>41</sup> Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia and Wisconsin.

<sup>42</sup> South Dakota and Vermont. The Vermont statute has never been amended after this Court's decision in *Furman v. Georgia* and is clearly unconstitutional. 13 Vt. Stat. Ann. §§ 7101-7107 (1974).

<sup>43</sup> To determine contemporary standards of decency in this nation, it is necessary to survey the nation as a whole. To survey only those states which permit the death penalty in determining society's attitude on the issue of executing juveniles would be comparable to surveying only slave states in 1860 in determining whether the torture of slaves offended the standards of decency then in existence.



The bare numbers of jurisdictions prohibiting the execution of 16-year-olds do not tell the whole story. The trend is to *raise* the minimum age at which an offender may be executed. Since 1984, six states have raised their age limit or imposed an age limit to prohibit the execution of 16-year-olds.<sup>44</sup>

Obviously the question cannot be whether *any* State would permit such a punishment, because if the decisions of the state legislatures were determinative, there would be no need for the Eighth Amendment. And, as will be seen, what is prohibited by law in some jurisdictions, generally is avoided by practice in those without a prohibition. "The acceptability of a severe punishment is measured not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." *Furman v. Georgia*, 408 U.S. 238, 278-79 (1972) (Brennan, J., concurring).

The State of Missouri has *never* in this century executed a person who was 16 years old or younger at the time of the offense. V. Streib, *Death Penalty for Juveniles*, 199 (1987). Less than one percent of all those people ever executed in this country were executed for crimes committed when they were 16 years old or younger. (See Appendix B). There has been no execution in this country of someone who was 16 years old or younger since 1959 (*Id.*).

Had Heath Wilkins not pleaded guilty, waived his right to a jury determination of sentence, and asked for the death sentence, it is extremely unlikely that he would now

<sup>44</sup> Those states are Colorado (from no specified limit to eighteen); Tennessee (from no specified limit to eighteen); Oregon (from sixteen to eighteen); Maryland (from fourteen to eighteen); New Jersey (from fourteen to eighteen); North Carolina (from fourteen to seventeen).

be on death row. Since the reinstatement of capital punishment in Missouri in 1977, 16 offenders who were 16 years old or younger at the time of the offense have been charged with first degree murder and certified to be tried as adults. Only Heath Wilkins received the death penalty. One who went to trial was acquitted<sup>45</sup> and two others were convicted of lesser degrees of homicide.<sup>46</sup> The State accepted guilty pleas to lesser degrees of homicide prior to trial in four cases;<sup>47</sup> reduced the charge before trial to murder in the second degree in one case;<sup>48</sup> and waived the death penalty in five cases.<sup>49</sup> In the remaining two cases, the jury found aggravating circumstances but rejected imposition of a death sentence.<sup>50</sup> Thus, the judgment of prosecutors and juries in Missouri has been that the death penalty is not an appropriate punishment for those who commit a crime at the age of 16 years old or younger. The actions of prosecutors and juries are particularly relevant because they are the ones who are faced, in the first instance, with the "question whether a sentence of death is excessive in the particular circumstances of any case" and are, therefore, "best able 'to express the conscience of the community on the ultimate question of life or death.'"

<sup>45</sup> *State v. Taylor*, CR83-2951 (Jackson County, February 9, 1984).

<sup>46</sup> *State v. Jones*, 699 S.W.2d 525 (Mo. App. 1985); *State v. Mouser*, 714 S.W.2d 851 (Mo. App. 1986).

<sup>47</sup> *State v. Atkins*, CR686-65F (Johnson County); *State v. Harris*, CR387-15FX (Phelps County); *State v. Jones*, CR87-6282 (Jackson County); *State v. Simpson*, CR286-2F (Jasper County).

<sup>48</sup> *State v. Boyland*, 728 S.W.2d 583 (Mo. App. 1987).

<sup>49</sup> *State v. Carr*, 687 S.W.2d 606 (Mo. App. 1985); *State v. Cason*, 596 S.W.2d 436 (Mo. 1980), *cert. denied*, 449 U.S. 982 (1980); *State v. Dayringer*, SD 15249-1 (Mo. App., July 26, 1988); *State v. Steward*, 734 S.W.2d 821 (Mo. banc 1987); *State v. Wilson*, ED 54624 (appeal pending).

<sup>50</sup> *State v. Allen*, 710 S.W.2d 912 (Mo. App. 1986); *State v. Scott*, 651 S.W.2d 199 (Mo. App. 1983).



*Spaziano v. Florida*, 468 U.S. 447, 470 (1984) (Stevens, J., dissenting) quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

Missouri's experience is not unique. There has been a dramatic decline in the number of people who are on death row for crimes committed while age 16 and younger. This stands in stark contrast to the rapid growth in the adult death row population. Between December 31, 1983, and June 30, 1988, the total death row population *increased by 69 percent* (from 1,209 to 2,048). See: United States Department of Justice, *Capital Punishment 1984* 16 (1985), and NAACP Legal Defense and Education Fund, Inc., *Death Row, U.S.A.* 1 (May 1, 1988). During the same period, the death row population of those sentenced for crimes committed while age 16 and younger *decreased by 30 percent*, from 10 to 7 (See Appendices D and E).

The seven persons currently under sentence of death for crimes committed at age 16 and younger constitute only 0.3 percent of the 2,048 persons now on death row. Of these seven, two will soon have their death sentences reversed under *Thompson*. Both were 15 at the time of their crimes and both were sentenced in states (Indiana and Louisiana) which had no specified minimum age limit. See *Thompson*, 108 S.Ct. at 2695 n. 26 (plurality opinion). Each of the remaining five was sentenced to death in states that have no specific statutory minimum age for imposition of the death penalty (Alabama, Florida, Missouri, Oklahoma, Pennsylvania, *Id.*). Therefore, none of the 16-year-old children currently on death row has been sentenced by a state which has "rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of [17] at the time of the offense. *Thompson*, 108 S.Ct. at 2707 (O'Connor, J., concurring). In those states where the execution of 16-year-olds is expressly permitted, there is not a single 16-year-old (nor anyone younger) under sentence of death.

"Legislative authorization, of course, does not establish acceptance." *Furman v. Georgia*, 408 U.S. at 278-79 (Brennan, J., concurring).

Like those who have served on juries, when asked directly, a majority of the American citizenry indicates disapproval of the death penalty for juveniles. For example in Georgia (which historically has executed more juveniles than any other state), polls show that two-thirds of the people were found to currently believe that life imprisonment should be the maximum punishment for juveniles. *Washington Post*, July 19, 1988 (Health) at 16.

Additional evidence of a national consensus against executing 16-year-olds can be found in the actions of professional groups concerned with our legal system, including those specifically involved with the juvenile justice system. As noted in *Thompson*, the legal profession's most respected groups (the American Bar Association and the American Law Institute), are on record in opposition to the execution of those below the age of 18. *Thompson*, 108 S.Ct. at 2696 (plurality opinion). The National Commission on Reform of Federal Criminal Laws also takes the position that the minimum age for imposition of the death penalty should be 18. See National Commission on Reform of Federal Criminal Laws, *Final Report of the New Federal Code* § 3603 (1971). Since *Thompson*, the National Counsel of Juvenile and Family Court Judges, one of the nation's oldest and largest judicial membership organizations, and the organization whose members have the most relevant experience and concern, passed a resolution opposing "capital punishment of those who committed an offense while under the age of eighteen years." Resolution #2, July 14, 1988.

Consensus may also be found in the views of the moral arbiters of society, the nation's religious leadership. As the amici brief of the religious organizations reflects,

there is pervasive opposition to the execution of juveniles within the religious community.

Finally, evidence exists that the international community disapproves of the execution of 16-year-old children.<sup>51</sup> Amnesty International recorded 11,000 executions throughout the world between January 1980 and May 1986. Only eight were of people under the age of 18 at the time of the offense. Three of those eight executions took place in the United States.<sup>52</sup> See Amnesty International, *United States of America: The Death Penalty* 74 (1987). Of even greater relevance, the United States has signed and/or ratified three international human rights treaties<sup>53</sup> which forbid the imposition of capital punishment for crimes committed by persons below 18 years of age. See *Thompson*, 108 S.Ct. at 2707-08 (O'Connor, J., concurring).

A determination of the "evolving standards of decency," *Trop v. Dulles*, 356 U.S. at 101, does not require the

<sup>51</sup> Prior decisions of this Court provide precedent for the propriety of examining the international community's attitude toward the specific punishment under review. See *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958); *Coker v. Georgia*, 433 U.S. 584, 596 n. 10 (1977); *Enmund v. Florida*, 458 U.S. 782, 796 n. 22 (1982).

<sup>52</sup> Each of these three executions involved juveniles over the age of 16 (Terry Roach, Charles Rumbaugh, Jay Pinkerton). V. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Cleve. St. L. Rev. 363, 385 (1986).

<sup>53</sup> Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. DOC A n. 6316 (1966) (United States a signatory); Article 4(5) American Convention on Human Rights, O.A.S. Official Records, OEA/ser K/XVI n. 1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (United States a signatory); Article 68, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (United States a ratifying country).

Court to find unanimity among the objective sources of data before a judgment can be made as to what the standards of decency are. This Court should add its own informed judgment to the quite pervasive consensus that the execution of any person for a crime committed before the age of 17 offends our current standards of decency and is, therefore, a cruel and unusual punishment. The Court's judgment can be buttressed by an examination of the justifications for the practice, and its lack of any measurable contribution to any legitimate goal of punishment.

### III. THE EXECUTION OF AN OFFENDER WHO WAS 16 AT THE TIME OF THE OFFENSE WOULD MAKE NO MEASURABLE CONTRIBUTION TO ANY LEGITIMATE GOAL OF PUNISHMENT

A punishment is unconstitutionally excessive if "it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. at 592.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court recognized two legitimate penological goals served by the death penalty: retribution and deterrence.<sup>54</sup> Neither goal is served by the execution of 16-year-old offenders.

#### A. Retribution

Retribution, as used by the Court in the Eighth Amendment context, refers to the need for citizens to express their moral outrage at particularly offensive con-

<sup>54</sup> In affirming Heath Wilkins' sentence of death, the Missouri Supreme Court identified incapacitation as the penological goal to be served by his execution (J.A. 94). However, "incapacitation has never been embraced as a sufficient justification for the death penalty." *Spaziano v. Florida*, 468 U.S. 447, 461 (1984).



duct, and thereby to feel satisfied that the criminal has gotten what he deserves for the harm he inflicted. *Id.* What an offender "deserves," of course, is measured not only by the nature of the act committed, but by the personal moral culpability of the offender when committing the act. *Tison v. Arizona*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 1676, 1683 (1987).

An evaluation of the moral culpability of a 16-year-old requires some understanding of the 16-year-old's capacity to truly understand the nature and consequences of his actions, and to control his emotional drives. Moral culpability implies an understanding of the array of good or malevolent choices, an ability to choose between them, and a conscious decision to choose the bad. See *Morissette v. United States*, 342 U.S. 246, 250 n. 4 (1952).

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.

*Eddings v. Oklahoma*, 455 U.S. 104, 115 n. 11 (1982) (quoting *Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime*, 7 (1978)).

There is a difference between simple factual understanding and the true understanding that comes from experience and maturity. A 16-year-old who drag races a car down a freeway at 120 miles an hour will be able to say, when asked, that such an act is "dangerous." But since he does not experience the danger the way an adult would, he does not avoid the behavior. See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion) ("minors often lack the experience, perspective, and judgment to recog-

nize and avoid choices that could be detrimental to them.") He does not experience the danger the way an adult would, in particular, because one of the key attributes of an adolescent mind is its rejection of the possibility of death. R. Kastenbaum, and R. Aisenberg, *The Psychology of Death*, 26-35 (1972). Adolescents of every generation have engaged in dangerous, risk-taking behavior—like antagonizing dangerous animals, jumping from inordinately high places, or racing with speeding trains on the tracks—because they are at that interim stage when they are beginning to experience themselves as a life force independent from their parents, but have not yet fully realized that life can be instantaneously and permanently extinguished. Sixteen-year-olds who kill may have some factual recognition that their acts will produce death, but they lack sufficient understanding of what that means to hold them fully morally accountable. "Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice, but of environmental pressures (or lack of them) or of other forces beyond their control." *McKeiver v. Pennsylvania*, 403 U.S. 528, 552 (1971) (White, J., concurring).

Nor do 16-year-olds have the capacity to understand and control the powerful emotional winds to which they are subject. Slamming doors, hostile silences, tearful confrontations, biting sarcasm and/or proclamations of dreaded humiliation mark the household of the most normal adolescent. "Adolescence is well recognized to be a time of physiological and psychological change and stress. Normal adolescents are distinguished from adults by their intensity of feeling, immature judgment, and impulsiveness." D. Lewis *et al.*, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 *Am. J. Psychiatry*, 584, 588 (May, 1988) (hereinafter cited as *Lewis, Neuropsychiatric*). Impulsiveness is especially



relevant to the issue of moral culpability. A person who is responding to impulses beyond his control has traditionally been viewed as less culpable than the cold-blooded, rational criminal. See *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring).

Finally, in many ways in our society, when children are still of an age to require parental control, the parents are held responsible for harm inflicted by the child.<sup>55</sup> While parents are not held criminally liable for the acts of their children, there is still the recognition that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school and social system, which share responsibility for the development of America's youth." *Eddings v. Oklahoma*, 455 U.S. at 115 n. 11 (quoting *Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime*, 7 (178)); see also, J.A. 106 (Welliver, J., dissenting) ("utilization of the death penalty in cases such as this only serves to bury and cover up the failures of our existing social and penal programs.").

The failure of developmental influences is particularly acute among juveniles who have committed a homicide. "The main characteristic shared by juveniles who commit serious crimes is membership in a family that provides inadequate supervision and in which there are conflicts, disharmony, and poor parent-child relationships."<sup>56</sup> National Institute for Juvenile Justice and Delinquency

<sup>55</sup> See, e.g., Mo. Rev. Stat. § 537.045 (1986). Parents or guardians liable for property damage or personal injury intentionally caused by unemancipated minor under the age of 18.

<sup>56</sup> The effect of these harmful environmental factors on Heath Wilkins is clear. At the time he committed the murder for which he received the death penalty, Heath was a 16-year-old boy suffering from a "profound developmental arrest" with no ability to use logic or reason to control his emotional impulses (J.A. 47).

Prevention, U.S. Dept. of Justice, *The Prevention of Serious Delinquency, What to Do?* 24 (1981), cited in Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1495 (1983). Adolescents who murder often share a common background of parental brutality, neglect or absence. Sendi, I.B., and Blomgren, P.G., *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 Am. J. Psychiatry 423 (1975), see also D. Lewis, et al., *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 Am. J. Psychiatry 1161 (1985). The only systematic study of juveniles on death row in this country concluded that "above and beyond the[] [normal] maturational stresses, homicidal adolescents sentenced to death have had to cope with brain dysfunction, cognitive limitations, severe psychopathology, and violent, abusive households." Lewis, *Neuropsychiatric*, supra p. 37 at 588. A child raised under such circumstances is likely to have an underdeveloped ego; less capacity to form mature judgments; less ability to control emotional impulses; and is more likely to experience uncontrollable impulses of rage. Sendi and Blomgren, supra at 423.

"[J]uveniles accused of a capital offense are uniquely vulnerable; they lack the maturity or insight to recognize the importance of psychiatric or neurological symptoms to their defense; and they are dependent on family for assistance in a way that adult offenders are not." Lewis, *Neuropsychiatric*, supra at 588-89. Unfortunately, "the very family members on whom these juveniles must rely to assist them in their defenses often collude with each other, the juvenile, and the attorney to minimize or conceal entirely the violence and abusiveness experienced in the home." *Id.*<sup>57</sup> While an adult may still be the product of

<sup>57</sup> When Heath Wilkins was asked if he could present mitigating

his upbringing, time and additional life experiences have usually provided him with the opportunity to change and overcome bad influences. A 16-year-old has not had such a chance.

Retribution is not served by the execution of 16-year-old offenders, who do not share with adults the capacity for mature judgment and control of behavior,<sup>58</sup> and thus do not "deserve" the ultimate penalty of death, no matter how heinous the offense.

### B. Deterrence

Given the characteristics of 16-year-olds who commit murder, the execution of a 16-year-old would not have a deterrent effect on other 16-year-olds.<sup>59</sup> This is true because of two major characteristics: 1) they do not con-

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evidence in his defense, he responded, "I don't know of any mitigating circumstances. They were saying that my background history was poor, but I don't think that anybody should drag other people into this." (J.A. 63). Wilkins did not want his mother's physical abuse of him brought out because "he likes his mother" and did not want to jeopardize their relationship, which has improved since his incarceration (J.A. 63-64).

<sup>58</sup> The fact that an adolescent is capable of planning and concealment behavior does not answer the question of moral culpability. A four-year-old child is capable of planning and concealment, as when he plans to sneak into his father's room the next time dad is distracted elsewhere so that he can play with the calculator he is forbidden to touch. When the calculator breaks, he knows to hide it, or to blame a sibling or the dog. Yet a four-year-old would never be held morally responsible for a homicide. Heath Wilkins planned to poison his mother and her abusive boyfriend when he was ten, but would not have been eligible for the death penalty had he succeeded, despite his capacity to "plan."

<sup>59</sup> When considering the deterrent effect of the death penalty, of course, one must have in mind not the mature, responsible 16-year-old who would not consider committing murder in any case, but the 16-year-olds who *do* commit murder, as we know them to be.

template the consequences of their actions; and 2) they do not fear death.

Sixteen-year-olds as a class, and certainly those who commit murder, neither think through consequences nor weigh alternatives in decision-making. C. Lewis, *How Adolescents Approach Decisions: Changes Over Grades 7-12 and Policy Implications*, 52 *Child Development* 538-544 (1981); Kohlberg, *Development of Moral Character and Moral Ideology in Review of Child Development and Research* 404-05 (M. Hoffman and L. Hoffman, eds. 1964). They live for the moment and have little appreciation that their decisions will have consequences. Kastenbaum, *Time and Death in Adolescence*, in *The Meaning of Death* 99 (H. Feifel, ed. 1959). "With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process." C. Bartollas, *Juvenile Delinquency* 102 (1985). Without a full contemplation that the death penalty may be the consequence of their homicidal behavior, the deterrent effect of a potential death sentence is lost.

Sixteen-year-olds believe in their own indestructibility and have not yet developed a full appreciation for the finality of death. See R. Lonetto, *Children's Conception of Death* 134-41 (1980); Muuss, *Social Cognition, David Elkind's Theory of Adolescent Egocentrism*, 17 *Adolescence* 249, 256 (1982). Their sense of omnipotence leads them, in the first place, to believe that they will not be caught for their offenses. But even if they contemplate being caught and contemplate being executed, the thought holds no terror for them. As in Heath Wilkins' case, the thought of incarceration for the rest of their lives may hold more sway than death itself. To Heath, incar-



ceration meant life in constant pain; death escape from pain. He could not imagine the third alternative: a life without constant pain.

Any potential deterrent effect the death penalty might have for 16-year-olds is completely negated by the infrequency of its use. A juvenile who paid attention to the ages of those executed would know that the odds are almost nil that a 16-year-old would be executed. Offenders 16 years old or younger account for 4.8 percent of all persons arrested for willful criminal homicide (*See* Appendix F). Only 0.3 percent of all offenders age sixteen or younger arrested for willful homicide receive the death sentence (*See* Appendices F and G), and so far none have been executed since 1959, ancient history to someone born in 1972.<sup>60</sup>

Given the strong evidence of consensus against the use of the death penalty for 16-year-olds, and given the characteristics of 16-year-olds that militate against use of the most severe sanction against them, the issue of deterrence should be resolved by requiring the State to justify the use of the ultimate penalty with proof that it does, in fact, deter homicides by 16-year-olds.<sup>61</sup>

<sup>60</sup> The infrequency of juvenile executions means that removing this class from those death-eligible will have no measurable impact on the overall use of the death penalty, and thus no impact on the general deterrent effect, if any, of the death penalty.

<sup>61</sup> Several members of the Court have questioned whether the death penalty serves as a deterrent at all. *See Spaziano v. Florida*, 468 U.S. at 480 (Stevens, J., dissenting); *Furman v. Georgia*, 408 U.S. at 302 (Brennan, J., concurring); *id.* at 353-54 (Marshall, J., concurring).

#### IV. THE EXECUTION OF HEATH ALLEN WILKINS WOULD BE CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE MISSOURI COURTS NEVER CONSIDERED HIS AGE, MATURITY OR MORAL RESPONSIBILITY

Even if this Court were to decide that the execution of those who committed their crimes while under the age of 17 is not *per se* cruel and unusual punishment, the execution of Heath Wilkins would violate the Eighth and Fourteenth Amendments. In sentencing Heath to death, the State of Missouri failed to carefully consider his age, maturity or moral responsibility.

In *Thompson*, the plurality, concurrence, and dissent agreed that the propriety of the death penalty for juveniles depends on a consideration of maturity. The dissent found that Wayne Thompson had been sentenced to death only after an individualized consideration of his maturity and moral responsibility. *Thompson*, 108 S.Ct. at 2712 (Scalia, J., dissenting). No such individualized consideration of Heath's maturity and moral responsibility has ever been made. Heath Wilkins did not even benefit from a "rebuttable presumption that he [was] not mature and responsible enough to be punished as an adult." *Id.* The Missouri statutory mechanism for transferring children from juvenile court to courts of general jurisdiction did not require the court to find that Heath was sufficiently mature and responsible to be treated and punished as an adult. All that was required was a finding that he had committed a very serious offense, and that the juvenile court system did not have the capacity to respond adequately. Once transferred to the courts of general juris-



diction, Heath Wilkins' age was irrelevant to the imposition and affirmation of his death sentence.

The juvenile court relinquished jurisdiction over Heath Wilkins because the "viciousness, force and violence" of his crime indicated "that the person guilty thereof [was] not a fit subject for rehabilitative facilities of the Juvenile Court." (J.A. 5). The court also noted "that only 17 months of rehabilitative confinement or treatment [were] available and . . . such a period [was] not adequate to rehabilitate him and protect society from him." (J.A. 5). The juvenile court relinquished custody over Heath Wilkins because he had been charged with a serious and vicious crime, not because he was an exceptionally mature and responsible 16-year-old boy.

In doing so, the juvenile court's decision was consistent with Missouri case law on this issue. "The ultimate purpose of the transfer of a juvenile . . . is to protect the public in those cases where rehabilitation appears impossible." *State ex rel. Arbeiter v. Reagan*, 427 S.W.2d 371, 377 (Mo. banc 1968) (emphasis in the original). A particular child's amenability to rehabilitation has nothing to do with maturity. Instead, the courts look at three factors: the seriousness of the offense, the age of the child at the time of certification, and, the availability of services. Thus, in *State v. Kemper*, 535 S.W.2d 241 (Mo. App. 1975), a 15-year-old boy accused of murder was certified to be tried as an adult because there were no available psychiatric facilities exclusively for juveniles, and because the boy would need more than five years of treatment. In *State v. Owens*, 582 S.W.2d 366 (Mo. App. 1979), a 15-year-old boy accused of rape was certified to be tried as an adult because of the "vicious nature of the crime" *id.* at 374, and because he needed supervision not available within the Division of Youth Services. *Id.* As the Missouri Supreme Court has noted, "[w]hether vel non the establishment of long term confinement centers for violent

juvenile offenders might be advisable, the juvenile court has the duty to review the amenability of the juvenile to treatment resources presently available." *In Interest of A.D.R.*, 603 S.W.2d 575, 582 (Mo. 1980) (emphasis in original). The fact that maturity is not considered in the certification process is well illustrated by the following two cases. *In Interest of A.D.R.*, *supra*, involved the certification of a 16-year-old boy. The Missouri Supreme Court upheld the certification of A.D.R. in part because of the boy's "demonstrated lack of impulse control" and his habit of associating "with people that seem to lead him on or talk him into more serious offenses." *Id.* at 581. *State of Missouri v. Mouser*, 714 S.W.2d 851 (Mo. App. 1986), involved the certification of a 16-year-old boy charged with capital murder. Arguing that certification was improper, Mouser pointed to evidence of his low intelligence and immaturity. *Id.* at 858. In upholding certification, the Court of Appeals held that:

Dr. Urie, the clinical psychologist in the case stated appellant had an average to above average level of intellectual functioning. He also testified to appellant's immaturity and tendency to make decisions emotionally rather than intellectually. Taking all of this testimony into consideration, the juvenile court was within its discretion in finding that appellant was intellectually average.

*Id.* A survey of Missouri cases addressing the certification issue revealed none in which a child was certified to stand trial as an adult on the basis of the child's maturity and moral responsibility. The individualized consideration of maturity necessary to determine whether Heath Wilkins "deserved" to be punished by death was not made as part of the process which resulted in his being tried as an adult.

After Heath Wilkins was transferred to the court of general jurisdiction, he was considered and treated as an adult. This, too, is in accordance with Missouri law. Once

the juvenile petition is dismissed and the juvenile is tried under the general law as an adult, protections of the juvenile code terminate. *State of Missouri v. Pierce*, 749 S.W.2d 397 (Mo. banc 1988). That Heath Wilkins was then 17 years old was irrelevant to the circuit court's determination that he was competent to represent himself and plead guilty. The judge had found Wilkins mentally competent, and so believed that Wilkins had a constitutional right to represent himself which the court was obligated to respect (Tr. 62).<sup>62</sup>

The court either ignored or failed to recognize the testimony and actions which evidenced Heath's immaturity. For example, Heath's desire for the death penalty was based on his belief "that the imposition of sentence would be rather immediate and that he would be able to get out of a period of incarceration which he found distasteful" (Tr. 22). Heath's ability to plan was limited to the immediate future (Tr. 32), and certainly did not encompass any real appreciation for the finality of death, either his victim's or his own. (See, e.g., J.A. 37, 65; Tr. 297-98). In addition, Heath's impulsive, immature behavior and style of decision-making were well documented (J.A. 16, 21, 46, 50, 70, 73), but were never considered. Instead, the court continuously relied on its finding that Heath was mentally competent.

Arguing for the death penalty, the prosecutor equated Heath's age with that of his victim, who was not a minor,

<sup>62</sup> Mo. Rev. Stat. § 211.071.7(2) requires the juvenile court to enter a finding that the "child was represented by counsel" if the juvenile court dismisses the petition to permit prosecution under the general law. It is not clear from that whether a juvenile could be permitted to represent himself. In civil law however, minors lack legal capacity to appoint counsel and such appointment, if made, is invalid and "absolutely void." *State ex rel. Dyer v. Union Electric Co.*, 309 S.W.2d 649 (Mo. App. 1958), quoting *Hodge v. Feiner*, 78 S.W.2d 478 (Mo. App. 1935).

but a 26-year-old woman (Tr. 293-94). That was the extent of the discussion of Heath's youth as a factor to be considered in determining the appropriate punishment. In fact, no individualized consideration of Heath Wilkins' age, maturity or moral responsibility was possible because no one involved in the process had an interest in seeing that they were considered. Instead, there was a 17-year-old boy asking the court to let him die. The court, as it had at every stage of the process, acceded to Heath Wilkins' request, and sentenced him to death (Tr. 301).

The Missouri Supreme Court failed to address the constitutionality of executing someone for a crime committed at the age of 16, despite having been asked to do so (J.A. 102 n. 8). The Court made it clear by its opinion that because Heath Wilkins had been found mentally competent,<sup>63</sup> his age at the time of the offense was irrelevant. (*Id.* at 89.)

Interestingly, the Court found most blameworthy that feature of Heath Wilkins' character which can best be explained by his age. The Court found Heath's attitude toward human life the "most chilling factor to be considered." (*Id.* at 94). Extreme indifference to human life, including one's own, is one aspect of adolescence, as dis-

<sup>63</sup> The Court's finding that the "overwhelming and uncontroverted evidence on this record" established that Heath Wilkins met "and continues to meet" the "basic test of competency" is remarkable in two respects. First, it ignores the conclusion of Dr. S.D. Parwatikar, in a report the court itself had ordered on appeal, that Heath Wilkins "was not competent to waive his Constitutional Rights and represent himself in front of the court" (J.A. 74), and the Court's appointment of defense counsel in light of Dr. Parwatikar's finding (J.A. 80). Second, the finding of competency was not an inquiry into maturity, but whether Heath was actively psychotic. (Whether mental illness renders the criminal defendant incompetent to stand trial because he "lacks capacity to understand the proceedings against him or to assist in his own defense." Mo. Rev. Stat. § 552.020.3(1) (Supp. 1984)).



cussed *supra* at 37. See also Ellison, *State Execution of Juveniles: Defining "Youth" as a Mitigating Factor for Imposing a Sentence of Less Than Death*, 11 Law and Psychology, 1, 32 (1987); R. Lonetto, *Children's Conception of Death* 134-41 (1980). Because the Missouri Supreme Court failed to consider the effect age had on Heath Wilkins' conduct and attitudes, it reached the erroneous conclusion that the only way to prevent him from killing again is to kill him first (J.A. 94). See Ellison, *supra* at 34 ("the juvenile murderer lacks the ability to empathize with his murder victim . . . because of the natural intellectual development of the juvenile, not because of his 'depravity of mind.'").<sup>64</sup> Had the Court considered Heath's age, it would have known that time alone will greatly reduce the probability that he will continue to engage in violent conduct. See e.g. California Youth Authority, *Offender-Based Institutional Tracking System* (1987) (76 percent of juvenile homicide offenders successfully completed parole compared to only 41.9 percent of juvenile non-homicide offenders.) Time, together with incarceration, can adequately protect society from Heath Wilkins.

The distinction between this case in which the death penalty was imposed, and the many cases involving 16-year-old offenders in which it is not, has nothing to do with maturity and moral responsibility. The distinction is that Heath Allen Wilkins asked for a sentence of death and the State of Missouri obliged him.

Heath Wilkins is typical of adolescents who commit murder. He shares the physical abuse inflicted on Monty

<sup>64</sup> Describing this indifference to human life, the Court reports on attempts Heath had made to kill other people, including his mother (J.A. 94). The Court fails to mention, however, that the "attempt" to kill his mother occurred when Heath was ten years old (J.A. 29). One is left with the impression that had his plot succeeded, his age would again have been irrelevant.

Lee Eddings,<sup>65</sup> the impulsiveness exhibited by William Wayne Thompson,<sup>66</sup> and the severe psychopathology found to exist in the fourteen juveniles currently on death row studied by Dr. Dorothy Lewis and her colleagues.<sup>67</sup> The execution of Heath Wilkins would be cruel and unusual punishment because it would serve no legitimate penological purpose. It would be cruel and unusual because no individualized consideration of Heath's age, maturity or moral responsibility has ever been made. Finally, it would be cruel and unusual because it would offend the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

#### CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Missouri Supreme Court insofar as it affirmed the death sentence, and grant such other relief as it deems appropriate.

Respectfully submitted,

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<sup>65</sup> *Eddings v. Oklahoma*, 455 U.S. at 104 (1982).

<sup>66</sup> *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988).

<sup>67</sup> Lewis, *Neuropsychiatric*, *supra* p. 37, cited in *Thompson*, 108 S.Ct. at 2699 n. 42.



## APPENDIX

**APPENDIX A**

**PERTINENT STATE STATUTORY PROVISIONS PROVIDING  
DIRECT OR INDIRECT MINIMUM DEATH PENALTY AGES**

**Direct Statutory Age Limit Specifically for Death Penalty**

**Age 18  
(11 States)**

- CALIFORNIA: Cal. Penal Code sec. 190.5 (Supp. 1987).  
 COLORADO: Col. Rev. Stat. sec. 16-11-103(1)(a) (Repl. 1986).  
 CONNECTICUT: Conn. Gen. Stat. Ann. sec. 53a-46a(g)(1) (1985).  
 ILLINOIS: 38 Ill. Ann. Stat. sec. 9-1(b) (Supp. 1987).  
 MARYLAND: 27 Md. Code sec. 412 (f) (Supp. 1987).  
 NEBRASKA: Nebr. Rev. Stat. sec. 28-105.01 (Supp. 1985).  
 NEW JERSEY: N.J. Stat. Ann. sec. 2A:4A-22(a) & 2C:11-3g (Supp. 1987).  
 NEW MEXICO: N.M. Stat. Ann. sec. 28-6-1(A) & 31-18-14(A) (Repl. 1987).  
 OHIO: Ohio Rev. Code Ann. sec. 2929.02(A) (Page 1984).  
 OREGON: Ore. Rev. Stat. 161.620 & 419.476(1) (1987).  
 TENNESSEE: Tenn. Code Ann. sec. 37-1-102(3), (4); 37-1-103; & 37-1-134(a)(1) (Repl. 1984).

**Age 17  
(4 States)**

- GEORGIA: Ga. Code Ann. sec. 17-9-3 (1982) (see also Bankston v. State, Ga. S.Ct., Apr. 20, 1988).  
 NEW HAMPSHIRE: N.H. Rev. Stat. Ann. sec. 630:5(XIII) (Supp. 1987).  
 NORTH CAROLINA: N.C. Gen. Stat. sec. 14-17 & 21-B:1 (Supp. 1987).  
 TEXAS: Tex. Penal Code Ann. sec. 8.07(d) (Supp. 1988)

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**Age 16  
(3 States)**

INDIANA: Ind. Rev. Code Ann. sec. 35-50-2-3 (Supp. 1987).

KENTUCKY: Ky. Rev. Stat. Ann. sec. 640.040 (1) (1987).

NEVADA: Nev. Rev. Stat. sec. 176.025 (1986).

**Indirect Statutory Age Limit for any Criminal Court Jurisdiction**

**Age 15  
(2 States)**

LOUISIANA: La. Rev. Stat. Ann. sec. 13:1570(a) (5) (1983).

VIRGINIA: Va. Code Ann. sec. 16.1-269(A) (1982).

**Age 14  
(5 States)**

ALABAMA: Ala. Code sec. 12-15-34(A) (1977).

ARKANSAS: Ark. Stat. Ann. sec. 41-617(2) (Supp. 1985).

IDAHO: Idaho Code sec. 16-1806A(1) (Supp. 1988).

MISSOURI: Mo. Rev. Stat. sec. 211.071 (1986).

UTAH: Utah Code Ann. sec. 78-3a-25(1) (Supp. 1985).

**Age 13  
(1 State)**

MISSISSIPPI: Miss. Code Ann. sec. 43-21-151 (1985).

**Age 12  
(1 State)**

MONTANA: Mont. Code Ann. sec. 41-5-206(1)(a) (1987).

**States\* With No Direct or Indirect Statutory Age Limit**

Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina, Washington, and Wyoming.

\*Pre-Furman statute still in the Vermont Code has no minimum age limit but statute is clearly unconstitutional and not in use by Vermont authorities.

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**APPENDIX B**

**JUVENILE AND TOTAL EXECUTIONS IN THE UNITED STATES, BY DECADE, JANUARY 1, 1900, THROUGH JUNE 30, 1988**

<u>Decade</u>	<u>Total Executions</u>	<u>Juvenile Executions Age 16 &amp; Younger</u>	
1900-09	1,192	10	(0.8%)
1910-19	1,039	7	(0.7%)
1920-29	1,169	5	(0.4%)
1930-39	1,670	6	(0.4%)
1940-49	1,288	22	(1.7%)
1950-59	716	8*	(1.1%)
1960-69	191	0	(0%)
1970-79	3	0	(0%)
1980-88**	97	0	(0%)
Totals:	7,385	58	(0.8%)

\*Last person executed for a crime at age 16 or younger was Leonard M. Shockley, executed in Maryland on April 10, 1959. (V. Streib, Death Penalty for Juveniles 118-119, 197 (1987))

\*\*Data current as of June 30, 1988.

Sources of Data: W. Bowers, Legal Homicide 54 (1984); V. Streib, Death Penalty for Juveniles 191-208 (1987); NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 1 (May 1, 1988).



## APPENDIX C

DEATH SENTENCES IMPOSED FOR OFFENDERS AGE 16  
AND YOUNGER AT THE TIME OF THE CRIME,  
JANUARY 1, 1982, THROUGH JUNE 30, 1988

Year	Offender's Name	Age at Crime	Race	State	Current Status
1982	[NO SENTENCES IMPOSED]				
1983	Cannaday, Attina	16	W	MS	reversed in 1984
	Harvey, Frederick	16	B	NV	reversed in 1984
	Hughes, Kevin	16	B	PA	now on death row
	Lynn, Frederick	16	B	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	B	MS	reversed in 1985
1984	Aulisio, Joseph	15	W	PA	reversed in 1987
	Brown, Leon	15	B	NC	reversed in 1988
	Thompson, W. Wayne	15	W	OK	reversed in 1988
1985	Morgan, James	16	W	FL	now on death row
	Ward, Ronald	15	B	AR	reversed in 1987
1986	Cooper, Paula R.	15	B	IN	now on death row
	Lynn Frederick	16	B	AL	now on death row
	Sellers, Sean	16	W	OK	now on death row
	Wilkins, Heath	16	W	MO	now on death row
1987	Dugar, Troy	15	B	LA	now on death row
1988*	[NO SENTENCES IMPOSED]				

\*Current as of June 30, 1988.

## APPENDIX D

PERSONS ON DEATH ROW AS OF DECEMBER 31, 1983,  
FOR CRIMES COMMITTED WHILE AGE 16 OR YOUNGER

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Jackson, Carnel	16	male	black
	Lynn, Frederick	16	male	black
Florida	Morgan, James	16	male	white
Kentucky	Ice, Todd	15	male	white
Mississippi	Cannaday, Attina	16	female	white
	Mhoon, James	16	male	black
Nevada	Harvey, Frederick	16	male	unknown
N. Carolina	Oliver, John	14	male	black
Oklahoma	Eddings, Monty	16	male	white
Pennsylvania	Hughes, Kevin	16	male	black

\*Sources of data: NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings v. Oklahoma, 455 U.S. 104 (1982); and V. Streib, Death Penalty for Juveniles 31 (1987).

## APPENDIX E

PERSONS ON DEATH ROW AS OF JUNE 30, 1988, FOR  
CRIMES COMMITTED WHILE AGE 16 OR YOUNGER

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Lynn, Frederick	16	male	black
Florida	Morgan, James A.	16	male	white
Indiana	Cooper, Paula R.	15	female	black
Louisiana	Dugar, Troy	15	male	black
Missouri	Wilkins, Heath	16	male	white
Oklahoma	Sellers, Sean	16	male	white
Pennsylvania	Hughes, Kevin	16	male	black

\*Sources of data: NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (May 1, 1988); and Streib, Persons on Death Row as of June 24, 1988, for Crimes Committed While Under Age Eighteen (June 24, 1988) (unpublished report prepared by V. Streib, Cleveland State University).

## APPENDIX F

ARRESTS FOR WILLFUL CRIMINAL HOMICIDE, BY AGE  
GROUPS, JANUARY 1, 1982, THROUGH JUNE 30, 1988

Year	Arrests for All Ages	Arrests for Age 16 & Younger	% of Arrests for All Ages
1982	18,511	846	4.6%
1983	18,064	768	4.3%
1984	13,676	582	4.2%
1985	15,777	772	4.9%
1986	16,066	844	5.3%
1987	15,903	870	5.5%
1988*	(8,000)**	(425)**	(5.3%)*
Totals:	105,997	5,107	4.8%

\*data current as of June 30, 1988

\*\*estimated because exact data unavailable

Sources of Data: *Thompson v. Oklahoma*, 56 U.S.L.W. 4892, 4897 (1988) (Stevens, J., plurality opinion); UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 174 (1987); *id.* at 174 (1986); *id.* at 174 (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); and Appendices B, C, D, and E.

## APPENDIX G

**DEATH SENTENCES FOR WILLFUL CRIMINAL  
HOMICIDE, BY AGE GROUPS, JANUARY 1, 1982, THROUGH  
JUNE 30, 1988**

<u>Year</u>	<u>Death Sentences For All Ages</u>	<u>Death Sentences For Age 16 &amp; Younger</u>	<u>% of Death Sentences For All Ages</u>
1982	284	0	0%
1983	259	5	1.9%
1984	280	3	1.1%
1985	273	2	0.7%
1986	297	4	1.3%
1987	(280)*	1	(0.4%)*
1988**	(140)*	0	0%
Totals:	1,813	15	0.8%

\*estimated because exact data unavailable

\*\*data current as of June 30, 1988

Sources of Data: *Thompson v. Oklahoma*, 56 U.S.L.W. 4892, 4897 (1988) (Stevens, J., plurality opinion); UNITED STATES DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1985 6 (1987); *id.* at 6 (1984); and Appendices B, C, D, and E.

## APPENDIX H

**LAWS OF MISSOURI RESTRICTING THE RIGHTS AND  
RESPONSIBILITIES OF CHILDREN 16 YEARS-OLD**

<u>Mo. Rev. Stat. Section<sup>1</sup></u>	<u>Statute</u>	<u>Age</u>
71.740	Minors <sup>2</sup> may be prohibited by their municipality from buying cigarettes and cigarette wrappers	
115.133	Vote	18
188.028	Obtain abortion without parental consent	18
167.031	Compulsory school attendance	16
194.220	Make anatomical gift, to take effect upon death	18
208.040	Parent eligible for aid dependent children until child reaches 18. (19 if full-time student in secondary school)	18
210.110	"Child" for purposes of child abuse statute	18
210.115	Court may order medical care where child does not receive medical treatment because of religious beliefs of parents	18
210.481	"Child" for purposes of foster care statute	18
211.021	"Child" for purposes of juvenile code	17
211.151	Child not to be detained in jail or adult detention facility pending disposition of a case	17

<sup>1</sup>All cites are to Missouri Revised Statutes (1986) unless otherwise indicated.

<sup>2</sup>The age of majority is not uniform in Missouri and no age is mentioned in the statute.



## 10a

Mo. Rev. Stat. Section	Statute	Age
211.171	Juvenile court hearings held separately from trial of cases against adults; general public excluded from hearings	17
211.271	Juvenile court adjudication not deemed a conviction	17
211.321	Juvenile court records kept separately; not open to inspection; may be sealed when child reaches 17	17
211.442	"Minor" and "child" for purposes of termination of parental rights statute	18
219.071	Children committed to division of youth services not to be transported or detained with criminals or vicious and dissolute persons	17
307.178	Mandatory seat belt use	4-16
313.280	Purchase lottery tickets	18
313.670	Wager on horse race	18
318.090	Patronize pool halls where liquor served	21
311.310 et seq.	Purchase intoxicating liquor	21
346.025	If purchaser of hearing aid under 18 has not been examined by physician, hearing aid fitter must recommend in writing that purchaser be examined	18
351.050	Capacity to incorporate	18
404.007 et seq.	Receive transfer of property without intercession of adult custodian	21

## 11a

Mo. Rev. Stat. Section	Statute	Age
431.055 et seq.	Enter into contracts	18
431.061	Consent to medical treatment of all types	18
431.067	Minor <sup>3</sup> may borrow money for higher education; has all rights, powers, privileges and obligations of adult.	
431.068	Donate blood without parental consent	17
434.060	Parents of minor may sue and recover money or property lost by minor in gambling	18
442.035	Where married to adult spouse, may not convey estate by entireties without participation of conservator or guardian ad litem	18
442.080	Conveyance of real estate by person under 18 voidable	18
451.090	Marry without parental consent	18
423.025	Give up child for adoption without guardian ad litem or be adopted without guardian ad litem	18
453.030		
473.110	Act as personal representative for administration of estate	18
473.117		
474.310	Make a will	18
475.055	Be declared a legal guardian	18
475.345	Sale, exchange, lease, gift, or contract by protectee while under 18 is voidable unless entered with consent of conservator	18

<sup>3</sup>See Footnote 2.

## 12a

Mo. Rev. Stat. Section	Statute	Age
494.010	Sit as juror	21
507.110	Commence, prosecute, or defend	18
507.115	action in own name	
516.030	In suits for recovery of land and	21
527.220	cases of lost deeds, statutes of limitations tolled until disability of infancy removed	
542.220	Municipality by proclamation may impose curfew against minors <sup>4</sup> for periods up to three days	
546.740	Witness an execution	21
563.061	Use of corporal punishment by parents, guardians, teachers, against minors permitted	
565.140	Restraint by parent, guardian or relative with purpose to control child does not constitute false imprisonment	17
568.070	Pawn property or sell to junk dealers	18
	Purchase blasting caps, bulk gunpowder, or explosives	17
571.060	Obtain blackjack or firearm	18
571.090	Obtain permit to acquire concealable firearm	21
573.040	Purchase pornography	18
568.060	Abuse of a child—proscribes knowing infliction of cruel and inhuman punishment of a child under 17, photography or filming of a child under 17 engaging in prohibited sexual act or permitting child to engage in act for purpose of photography or film	17

<sup>4</sup>See Footnote 2.

## 13a

Mo. Rev. Stat. Section	Statute	Age
491.678 et seq.	Child victim witness protection law—video recording of child victim may be used as substantive evidence and defendant may be excluded from the child's deposition proceeding under certain circumstances	17
537.045	Custodial parent or guardian liable for payment of judgment up to \$2,000 for acts of vandalism or purposeful personal injury by minor	18
556.061	Defines sexual performance for purposes of criminal code as any performance or part thereof which includes sexual conduct by a child under 17	17
573.010, RSMo Supp. 1987	Child pornography, material or performance depicting sexual conduct, contact, or performance and having as participant or observer child under age 18	18
577.500, RSMo Supp. 1987	One year revocation of driver's license for persons under 21 determined to have committed certain alcohol, controlled substance, and/or motor vehicle offenses	21

## OCCUPATIONS

Mo. Rev. Stat. Section	Statute	Age
190.145	Ambulance attendant or driver or Emergency Medical Technician	18
329.070	Apprentice or student cosmetologist, hairdresser or manicurist	17

## 14a

Mo. Rev. Stat. Section	Statute	Age
330.030	Podiatrist	21
326.060	Certified public accountant	21
327.131	Architect	21
327.221	Professional engineer	21
327.312	Land surveyor-in-training	21
328.080	Barber	17
331.030	Chiropractor	21
294.120	Miner or quarry worker	18
302.060	Chauffeur's license	18
302.272, RSMo Supp. 1987	School bus operator	21
311.300	Seller of intoxicating liquor or non-intoxicating beer	21
311.300	Bartender	21
332.131	Dentist	21
333.041	Funeral director or embalmer	18
334.530	Professional physical therapist	21
335.046	Registered professional nurse	19
	Licensed practical nurse	18
336.030	Optometrist	21
337.020	Psychologist	21
338.030	Pharmacist	21
339.040	Real estate broker or salesperson	18
341.170	Master plumber	25

## 15a

Mo. Rev. Stat. Section	Statute	Age
	Journeyman plumber	21
	Master drain layer	25
334.030	Nursing home administrator	21
346.055	Hearing aid fitters and dealers	21
354.235	Enrollment representative for health services corporation	18
375.091	Insurance brokers	18



6  
**No. 87-6026**

Supreme Court, U.S.  
**FILED**

**OCT 11 1988**

**JOSEPH F. SPANIOL, JR.**  
CLERK

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1988**

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**HEATH A. WILKINS,**  
*Petitioner,*

**vs.**

**STATE OF MISSOURI,**  
*Respondent.*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF MISSOURI**

---

**BRIEF OF RESPONDENT**

---

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## **STATUTORY PROVISIONS INVOLVED**

Mo.Rev.Stat. §§211.071 and 565.020 (1986) appear as Appendix A of this brief.

## **STATEMENT OF THE CASE**

On July 27, 1985, petitioner Heath Wilkins stabbed to death Nancy Allen, a twenty-six-year-old mother of two, at a convenience store in Avondale, Missouri (Tr. 195, 220-221). At the time of this murder, petitioner was sixteen years and six months of age, having been born on January 7, 1969 (J.A. 5).

### **A. Procedural History**

#### **1. Juvenile Proceedings**

Being six months short of the age of majority for purposes of criminal prosecution, Mo.Rev.Stat. §211.021(1) (1986), petitioner was initially within the jurisdiction of the juvenile court. On August 15, 1985, a hearing was held before the juvenile judge on a motion filed by the Juvenile Officer to terminate juvenile-court jurisdiction and certify petitioner for trial as an adult, as provided for under Mo.Rev.Stat. §211.071 (1986) (J.A. 4; Respondent's Appendix A).<sup>1</sup> Thereafter, the juvenile court certified petitioner for trial as an adult, noting among other things the "viciousness, force and violence" of the crime alleged and the fact that petitioner had repeatedly committed criminal acts despite past juvenile treatment programs (J.A. 5). The court further observed that petitioner "is an experienced person, and mature in his appearance and habits to the extent that the juvenile forum and rehabilitative machinery are not adequate for his treatment and confinement" (J.A. 5).

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1. Because petitioner has never previously advanced any challenge to his certification as an adult—let alone claimed that Missouri's certification process renders his death sentence invalid (Pet.Br. 43-45)—no transcript of the juvenile court's hearing was filed with the Supreme Court of Missouri and none has therefore been certified to this Court. See Part IV of respondent's Argument, *infra*.



## 2. Charge and Competency Hearing

On October 8, 1985, an information was filed in the Circuit Court of Clay County charging petitioner with first degree murder, Mo.Rev.Stat. §565.020 (1986) (J.A. 1-3; Respondent's Appendix A).<sup>2</sup> At the request of petitioner's appointed counsel, the court ordered two separate psychiatric evaluations to be conducted upon petitioner as provided for under Mo.Rev.Stat. §552.030 (1986) (Tr. 4-7; J.A. 7-51). In the course of these examinations, petitioner made known his desire to enter a plea of guilty to the charges and receive a sentence of death (Tr. 12-14, 20-21, 30, 55, 58-59).

On April 16, 1986, a hearing was held on the issue of petitioner's competency to stand trial (Tr. 6-8). The witnesses at this hearing were the two physicians who conducted psychiatric evaluations of petitioner, Dr. Steven Mandraccia of the Western Missouri Mental Health Center and Dr. William Logan of the Menninger Foundation (Tr. 6-40; J.A. 7-51). Dr. Mandraccia testified that petitioner suffered from no "mental disease or defect" as defined by Missouri law,<sup>3</sup> that he fully understood the proceedings against him, including the fact that he could receive the death penalty, and that he was therefore competent to stand trial (Tr. 11-15; see J.A. 9-12). Dr. Mandraccia further stated that this finding of competency

2. Petitioner was also charged in separate informations with armed criminal action, Mo.Rev.Stat. §571.015 (1986), and carrying a concealed weapon, Mo.Rev.Stat. §571.030.1(1) (1986) (Tr. 144-164). All three charges were addressed at petitioner's arraignment, competency hearing, waiver of counsel and plea of guilty (Tr. 3-6, 69, 83-88, 97-100, 105, 144-164, 167-178).

3. Mo.Rev.Stat. §552.010 (1986). This term and its definition derive from the ALI Model Penal Code, §4.01 (Final Draft 1962). The same term appears in the federal statute relating to mental competency, 18 U.S.C. §4241(a), and it has been similarly defined by several federal circuits. See e.g., *United States v. Torniero*, 735 F.2d 725, 728-729 (2nd Cir. 1984); *United States v. Lewellyn*, 723 F.2d 615, 616 (8th Cir. 1983).

was not affected by petitioner's stated preference for the death penalty (Tr. 12-13), and that he believed that petitioner was competent to decide whether or not to enter a plea of guilty (Tr. 14-15).

The testimony of Dr. Logan was somewhat equivocal in that he declined to reach a "definite conclusion" as to petitioner's competency (Tr. 18-19). He found that petitioner understood the charges against him, the range of punishment and the legal options available to him (Tr. 19-20; J.A. 48); that petitioner was of average intelligence and had an accurate and detailed memory of the crime (Tr. 20, 29-30; J.A. 46); and that he had at least a facially rational basis for his decision to plead guilty and receive a death sentence (Tr. 20-21, 30-32, 34-36; J.A. 48-49). Dr. Logan further testified that petitioner's act of murder was "very purposeful, very deliberate [and] very well-planned" and that he was emotionally indifferent to the taking of human life (Tr. 33-34; J.A. 44-45). The only qualification by Dr. Logan as to petitioner's competency was his conclusion that petitioner suffered from "personality disorders" which, while they might not constitute a mental disease or defect, led petitioner to make decisions impulsively and on an emotional rather than a rational basis (Tr. 21-25, 32-33, 39-40; J.A. 22-23, 48-51); in the words of the witness, petitioner could not tolerate frustration or discouragement and preferred a "quick solution" rather than a lengthy trial and incarceration (Tr. 37, 39).

Based upon the above evidence, the Circuit Court, the Honorable Glennon E. McFarland, found petitioner competent to proceed (Tr. 42).

## 3. Waiver of Counsel and Plea of Guilty

Immediately after being found competent to proceed, petitioner made a *pro se* request to discharge his attorney and represent himself (Tr. 42-43). The reason given by

petitioner for this request was that he wished to plead guilty and receive a sentence of death, and his attorney felt ethically constrained from seeking that end (Tr. 42-43, 46-48, 57-59). A lengthy discussion ensued in which the judge admonished petitioner that retaining the services of an attorney would be in his best interests, to which petitioner responded that he still wanted to proceed *pro se* (Tr. 43-59). The court nevertheless refused to grant petitioner's request and instead gave him seven additional days to reconsider his decision (Tr. 59, 67-68).

A week later, on April 23, 1986, petitioner reappeared before Judge McFarland with his appointed counsel (Tr. 69). In further investigating petitioner's continuing request to represent himself, the court explained to petitioner the murder charge against him, the range of punishment and the bifurcated nature of capital proceedings (Tr. 70-72); listed the numerous matters in which the assistance of counsel would be valuable (Tr. 72-74); and repeatedly encouraged petitioner to change his mind (Tr. 73-74, 79). When petitioner persisted in his request (Tr. 74-82), he was provided by the court with a written waiver of counsel, which he was given an hour to examine (Tr. 82-83; Legal File, hereinafter "L.F.," at 23-24). After filling out and signing the waiver form, petitioner's request to discharge his attorney and proceed *pro se* was granted (Tr. 83-87); however, the court ordered petitioner's former counsel to remain available for consultation or legal advice during court proceedings (Tr. 87-89).

Following the discharge of his attorney, petitioner stated his intention to enter a plea of guilty to first degree murder and the two related charges (Tr. 89-90). In response, Judge McFarland strongly advised petitioner that such a step was "not a good move" or in petitioner's best interests (Tr. 90, 93), and graphically described to

him an execution by lethal gas in suggesting that he reconsider his decision (Tr. 93-95). When petitioner persisted, the court recommended that he "talk to other people about this decision you're having to make" and postponed the taking of any guilty plea for sixteen days, until May 9 (Tr. 95-96). On April 29, petitioner briefly reappeared in court so that he could be provided with a written petition to enter a plea of guilty which advised him of the consequences of such a plea (Tr. 96-104; L.F. 25-30).

On May 9, 1986, petitioner appeared before the Circuit Court and restated his desire to enter pleas of guilty to the offenses charged (Tr. 104-106, 109-113). An extensive record was made regarding the knowing and voluntary character of this decision, during which petitioner was readvised of his pertinent constitutional rights and again admonished regarding the consequences of his plea (Tr. 109-123, 131-144). Petitioner personally described the means by which the murder was committed (Tr. 124-128), and also concurred in a further description of the crime by the prosecutor (Tr. 128-131). Petitioner then signed the guilty plea petition and entered his plea of guilty to first degree murder (Tr. 120-123, 143-144). After this plea of guilty had been accepted, petitioner entered separate guilty pleas to the charges of armed criminal action and carrying a concealed weapon (Tr. 144-164).

#### 4. The Punishment Hearing

The hearing on punishment in this cause was conducted on June 27, 1986 (Tr. 167). Following his sentencing on the two lesser charges (Tr. 175-178), petitioner entered an oral and written waiver of his right to a punishment-phase jury and to the representation of counsel in that proceeding (Tr. 168-175, 179-194; L.F. 31-38).



During the punishment hearing, the state introduced into evidence petitioner's written confession (Tr. 218-227; State's Exhibit 22), and presented other witnesses and exhibits detailing how this crime was committed (Tr. 194-233; State's Exhibits 1-6, 9-13, 16-19, 21). In addition, the state recalled Drs. Logan and Mandraccia to elaborate upon their evaluations of petitioner (Tr. 245-276), and offered voluminous records regarding petitioner's history of treatment as a juvenile (Tr. 233-244; State's Exhibit 24). In the course of the state's case, petitioner interposed several objections either directly or through his advisory counsel, challenging the relevancy or admissibility of some of the evidence offered (Tr. 237-238, 240-241, 257-260, 262-265, 267-269). At the close of the state's punishment evidence, petitioner attempted to call as a witness his codefendant, Pat Stevens, apparently for the purpose of emphasizing petitioner's predominant role in planning and executing the murder (Tr. 277-287); however, Stevens invoked his Fifth Amendment rights on advice of counsel (Tr. 287-289). Closing arguments were presented by both parties, with both sides urging the imposition of a death sentence (Tr. 289-298). Thereafter, the Circuit Court entered written findings of fact in which it concluded that two statutory aggravating circumstances were shown by the evidence beyond a reasonable doubt (Tr. 298-301; J.A. 77). Based upon these aggravating factors, and after considering "all other proper and lawful matters", the court determined that petitioner should receive a sentence of death (J.A. 77).

### 5. The Appeal

Although petitioner filed no notice of appeal from his conviction and sentence, an appeal to the Supreme Court of Missouri was mandatory by reason of the sentence of death imposed. Mo.Rev.Stat. §565.035.1 (1986).

Because of petitioner's continuing position in favor of the execution of his sentence, the State Public Defender was appointed as *amicus curiae* and directed to brief and argue "any issue subject to review." *State v. Wilkins*, 736 S.W.2d 409, 411 (Mo. banc 1987) (J.A. 80). Following an oral argument at which petitioner appeared and was permitted to make a statement, the Missouri Supreme Court ordered that petitioner be examined to determine whether he was competent to waive the assistance of counsel on appeal. *Id.* The designated physician, Dr. S. D. Parwatikar, concluded that although petitioner was competent to assist an attorney, he was not competent to waive counsel and represent himself before the Supreme Court (J.A. 52-75).<sup>4</sup> As a result, the State Public Defender was appointed as petitioner's counsel on appeal, and the present cause was rebriefed and reargued. *State v. Wilkins*, *supra* at 411 (J.A. 80). On September 15, 1987, the Supreme Court of Missouri issued an opinion affirming petitioner's conviction and sentence. (J.A. 79-94).

## B. The Crime and the Defendant

### 1. The Facts of the Crime

The details of petitioner's murder of Nancy Allen emerge from his "factual basis" testimony during his plea of guilty (Tr. 124-131), and also from his confession to police which was introduced in the punishment-phase hear-

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4. Even though the report of Dr. Parwatikar was not before the sentencing court, and did not purport to address petitioner's responsibility for his actions at the time of the murder or his competency at the time of the plea, petitioner has continued to cite and rely upon this report in reciting the "facts" upon which the sentencing court's decision was based (Pet.Br. 11, 17, 19). As petitioner acknowledges, a similar attempt was rejected by the Supreme Court of Missouri (Pet.Br. 47, n. 63), and for the reasons discussed in footnote 5, *infra*, it should be rejected here.



ing (Tr. 218-228).<sup>5</sup> The evidence presented to the Circuit Court showed the following: as of July of 1985, petitioner was sixteen and a half years of age and had recently been released from the custody of the Missouri Division of Youth Services on the condition that he go to work for the Job Corps in Utah (Tr. 236-237). Instead, he returned to the Kansas City area and lived "in the streets" (Tr. 219). There, petitioner associated with three other youths: Pat Stevens ("Bo") Ray Thompson ("Shades") and Marjorie Filipiak ("Midget"); petitioner himself went by the nickname "Pyzon" (Tr. 3, 37, 220).

Sometime in mid-July, when Stevens indicated that he needed money, petitioner told the others about a plan he had to get some money by committing a series of robberies at business establishments in the area (Tr. 126, 219-220, 227). Although a gas station and a pizza restaurant were mentioned as possible targets, petitioner's attention focused in particular upon Linda's Liquors and Deli, a small convenience store located in the town of Avondale north of Kansas City (Tr. 129, 220; State's Exhibit 1). In committing these robberies, petitioner's express plan was to murder "whoever was behind the counter," the reason

5. In his account of the facts (Pet.Br. 19-21), petitioner has chosen to ignore or discount his admissions at his plea of guilty and in his confession, and instead relies upon conflicting assertions made to one of his examining psychiatrists (J.A. 25-51). A major difficulty with this attempt is that, as noted by petitioner in an objection made during the punishment hearing (Tr. 257-260), this testimony was admissible only as relevant to petitioner's mental condition and not for the truth of the matters asserted. Section 552.030.5. After petitioner's objection on this basis, the Circuit Court stated that it would not consider the evidence at issue "in connection with defendant's guilt in this case" (Tr. 298-299). The Missouri Supreme Court similarly relied in its opinion upon the facts developed in petitioner's guilty plea and confession, as it was certainly entitled to do. *State v. Wilkins, supra* at 411-412 (J.A. 81-83). This Court has customarily accepted the factual determinations of state courts in cases before it, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-112 (1980), and the same principle should apply here.

being that "a dead person can't talk" (Tr. 125-128, 226). To carry out his intention to kill any witnesses, petitioner bought from Pat Stevens a "butterfly knife" (a narrow-bladed martial arts weapon), using the proceeds from his burglary of a laundromat, and sharpened the blade with a file (Tr. 221, 224-225).

At 10:15 p.m. on Saturday, July 27, one to two weeks after forming his plan to rob Linda's Liquors and murder its occupants, petitioner and his three companions met at a nearby hospital in accordance with that plan (Tr. 126, 128-129, 220-221). While Ray Thompson and Marjorie Filipiak waited at the hospital, petitioner and Pat Stevens walked to a creek near Linda's Liquors, where they watched the store for about an hour (Tr. 129, 221). When all of the customers in the store had left, petitioner and Stevens went inside; petitioner ordered a sandwich from Nancy Allen, the store clerk, while Stevens asked to use the bathroom (Tr. 129, 221, 230-231; State's Exhibits 1-5). As Allen made the sandwich, petitioner saw that she was not in a position to be grabbed from behind by Stevens when he came from the bathroom, so he asked for extra lettuce on his sandwich (Tr. 221). Allen then went to a nearby counter, whereupon Stevens came out of the bathroom and grabbed her (Tr. 221, 226). Petitioner produced his butterfly knife, ran around the counter and stabbed Nancy Allen once in the back "where I thought was her kidney" (Tr. 124, 130, 205-206, 211, 221; State's Exhibits 18-19). When the victim fell to the floor, petitioner stabbed her three more times in the chest, aiming for her heart and lungs (Tr. 124, 130, 202-205, 221, 226-227; State's Exhibits 9-12); two of these stab wounds penetrated the victim's heart (Tr. 202-204, 212-213). As Allen lay mortally wounded on the floor, she began talking to petitioner and Stevens (Tr. 130, 221, 226-227). Petitioner told Allen to shut up, and then stabbed her four more times in the

throat to silence her (Tr. 124, 130, 202-204, 213, 221, 226; State's Exhibits 9-11, 16-17). At no time did the victim resist the robbery or struggle in any way; as petitioner put it, "[s]he did not have time" (Tr. 226).

While petitioner was stabbing Allen, Stevens was taking liquor, cigarettes and rolling papers from the store shelves (Tr. 130, 222). In addition, some four hundred and fifty dollars in cash and checks were taken from the cash register (Tr. 222-223, 231-232; State's Exhibit 5). On the way out of the store, petitioner made sure to wipe off the doorknob so as to eliminate any fingerprints (Tr. 227). Petitioner and Stevens returned to the hospital to rendezvous with their two companions, and the group then took two separate cabs to a Kansas City bus station to throw off any pursuit (Tr. 130, 223). After splitting up the loot, they returned to a park area where they customarily lived, again in separate cabs (Tr. 130-131, 223). The body of Nancy Allen was discovered by a police officer shortly after midnight on July 28 (Tr. 194-195, 198-199). A week later, "some guys" came to the area habituated by petitioner and his friends (Tr. 224). Petitioner told Pat Stevens to bring them to a place where he could kill them with his knife (Tr. 224); however, when a police officer appeared, petitioner threw the murder weapon in a lake (Tr. 131, 224). The knife was never recovered (Tr. 131).

## 2. The Character and History of Petitioner

Considerable evidence was introduced at the punishment hearing regarding the character and prior conduct of petitioner. From the age of eight onward, petitioner was continually in the custody of the juvenile court, and frequently housed in juvenile facilities, because of repeated acts of burglary, stealing and arson (Tr. 234-237, 261, 264; J.A. 8-9, 28-30). Psychiatric reports and testimony also indicated that petitioner had attempted to kill his mother

by putting insecticide into Tylenol capsules (Tr. 262; J.A. 29, 39) and had poisoned or otherwise killed several animals in his neighborhood (Tr. 262; J.A. 29-30). Especially noted were petitioner's complete lack of concern for moral standards of conduct—one commentator described him as having a "Swiss cheese conscience" (J.A. 42)—and his lack of empathy or concern for human life (J.A. 22, 46). In explaining his decision in advance to kill any witnesses, petitioner analogized the murder victim to a trash can: if a trash can is in the way, one can walk around it or kick it out of the way; however, if one walked around it, it would be in the way in the future (J.A. 36).<sup>6</sup>

The psychiatric witnesses and medical records presented at petitioner's punishment hearing indicated that he had had a "chaotic" childhood, had abused drugs over a long period, and suffered from "personality disorders" which could affect his reasoning and judgmental processes (Tr. 269-274; J.A. 8-9, 12-13, 16-22, 28-51). Nevertheless, both witnesses stated that, whatever the quality of petitioner's judgment, he was aware of his actions and that what he was doing was wrong (Tr. 247, 270; J.A. 12-13, 49). The witnesses differed as to whether petitioner's emotional problems were to any extent a factor in mitigation of punishment (Tr. 247-248, 270-274).

On the basis of the above evidence, the Circuit Court found beyond a reasonable doubt that petitioner's murder of Nancy Allen was committed while petitioner was engaged in the perpetration of the felony of robbery, Mo. Rev.Stat. §565.032.2(11) (1986); and that the murder was outrageously or wantonly vile, horrible or inhuman in that

6. At one point in his initial confession to police, petitioner had claimed that his murder of Nancy Allen was motivated by the fact that she "had made fun of me in the past" (Tr. 219). Later, however, he admitted that this was untrue and that he had made this statement as part of an effort to "play crazy" (Tr. 256; J.A. 36).



it involved depravity of mind, §565.032.2(7) (J.A. 77).<sup>7</sup> The resultant sentence of death was upheld on independent review by the Supreme Court of Missouri. *State v. Wilkins*, *supra* at 416-417 (J.A. 91-94).

### SUMMARY OF ARGUMENT

In the present case, as in *Thompson v. Oklahoma*, this Court is asked to draw a "bright line" under the Eighth and Fourteenth Amendments where no such bright line exists by categorically declaring the death penalty to be "cruel and unusual punishment" for any murder committed by any person who is so much as one day under his seventeenth birthday, no matter what the facts of the crime or the nature of the defendant. While a qualitative distinction based solely on age may be made in general terms with regard to much younger individuals who have not received death sentences in the recent history of the United States, no tenable analysis supports an Eighth Amendment distinction between sixteen-year-old and seventeen-year-old killers merely according to their birthdates.

The thesis that "evolving standards of decency" support the position advocated by petitioner is refuted by a review of objective indicators of public attitudes, the most reliable of which is the legislation enacted by the people's elected representatives. Of the 36 states which currently authorize capital punishment, 22 permit the execution of those who commit a capital homicide at age sixteen. The

7. Petitioner attempts to derive some significance from the fact that the court did not find a third statutory aggravating circumstance pertaining to the murder of a witness, his apparent implication being that the court must have disbelieved petitioner's admission that he killed Nancy Allen to prevent her from being a witness against him (Pet.Br. 20; see Tr. 127-128, 226). The difficulty with this theory is that Nancy Allen was undisputedly not "a witness or potential witness in any past or pending investigation or past or pending prosecution," §565.032.2(12), so this statutory aggravating circumstance was inapplicable to the present case under any construction of the facts.

assumption by petitioner and some opinions in *Thompson* that those age provisions which appear in juvenile transfer statutes rather than capital punishment laws may be disregarded is both legally and factually flawed. This analysis overlooks the fact that the search for "standards of decency" rests upon patterns of legislation, not individual laws, and further that the link between legislation and public standards cannot be proven directly but itself rests upon a presumption that legislators vote the views of their constituents. The presumption that legislators were not oblivious to the existence of capital punishment in their state when they enacted legislation subjecting juveniles to adult criminal penalties is at least as reasonable as the presumption cited above which this Court makes whenever it engages in an Eighth Amendment analysis.

Even aside from this fact, ample evidence exists that the possibility of a death sentence was considered in the enactment of juvenile transfer statutes, and further that this result is publicly supported regardless of the intent of the legislators at the time of passage. Some of the statutes in question make affirmative references to capital punishment or to capital crimes in specifying when juveniles may be tried as adults. Most of the jurisdictions at issue have passed laws which expressly acknowledge the relevance of the defendant's age in determining whether a sentence of death is appropriate. Further, given the repeated instances in which the minimum capital punishment age was raised after a person of lesser age was sentenced to death, the continued existence or reenactment of a juvenile transfer statute after one or more juveniles received a sentence of death in that state is itself significant in determining public attitudes on this question.

The remaining "objective" factors cited by petitioner lend no support to his position. Respondent disputes the assumption that, if it were shown that juries were more



reluctant to sentence sixteen-year-old murderers to death, this would support the notion that such sentences are considered to be "indecent." Precisely the same result would obtain if—as would seem very likely—juries were to believe that the defendant's age is a particularly important mitigating factor in capital cases, to be overcome only in extraordinary circumstances. In any event, no evidence has been offered by petitioner, and respondent finds none, to support the notion that death sentences for those who murder at age sixteen are disproportionately rare when compared with the number of opportunities juries have had to consider imposing this penalty. Petitioner's reliance upon such matters as statements by interest groups on the present issue and laws of other countries is meritless because these are not, by any reasonable measure, reliable objective indicators of public standards in the United States.

Petitioner additionally argues that the imposition of a death sentence upon any sixteen-year-old murderer is inherently disproportionate to his offense. This assertion is refuted by petitioner's complete inability to draw a universally applicable chronological line with regard to when persons are responsible for their actions, or when their culpability is such that capital punishment may be justified. Because of the obvious absence of such a line, petitioner's position is not only unsupported by any "proportionality" analysis, but promotes the arbitrary and freakish imposition of death sentences—premising a defendant's eligibility for capital punishment solely upon a matter of days or months in his date of birth. The bizarre and unjust character of such a distinction is vividly demonstrated in the companion case of *High v. Zant*, in which it is currently unclear whether the petitioner was seventeen or nineteen at the time of the murder for which he was sentenced to death.

Finally, petitioner advances several additional claims in his brief which were not presented to the courts below, were not raised in his petition for a writ of certiorari, or are beyond the scope of this Court's limited grant of certiorari. Under the rules and decisions of this Court, these improperly-presented claims should be disregarded.

## ARGUMENT

### I. Introduction

In past decisions involving capital punishment, this Court has drawn "bright lines" in Eighth Amendment terms, limiting its infliction to the crime of murder, *Coker v. Georgia*, 433 U.S. 584 (1977); requiring the showing of a specified minimum intent on the part of the defendant, *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. ...., 107 S.Ct. 1676, 95 L.Ed. 2d 127 (1987); and recognizing the longstanding prohibition against execution of the insane. *Ford v. Wainwright*, 477 U.S. 399 (1986). The lines thus drawn were, at least, intuitively clear and reflected some qualitative distinction between those crimes or defendants included and those excluded. In the present case, by contrast, this Court is asked to draw a "bright line" where one does not exist: to hold that, even where an individual has committed an intentional murder, and whatever the circumstances of that murder, his execution cannot be countenanced under the Eighth Amendment if he was as much as one day short of his seventeenth birthday when the murder was committed—although this penalty may well be permissible had he been days or months older at the time of the crime. A review of the pertinent indicators of public attitudes fails to support this distinction, and the sweeping pronouncements by petitioner concerning adolescent development (Pet.Br. 35-42) demonstrate its arbitrary character.

Since petitioner does not and could not claim that the Eighth Amendment, as applied to him by the Fourteenth Amendment, was conceived by its framers to prohibit his execution, *Thompson v. Oklahoma*, ..... U.S. ...., 108 S.Ct. 2687, 2714, 101 L.Ed.2d 702 (1988) (Scalia, J., dissenting; hereinafter cited as "dissent"), his reliance of necessity is upon the proposition that "evolving standards of decency which mark the progress of a maturing society" have changed the views of the American public. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); see also *Weems v. United States*, 217 U.S. 349, 373-374 (1910). The identification of "evolving standards of decency" by this Court is, as members of this Court have noted, a hazardous proposition in the best of circumstances.<sup>8</sup> Even when emphasis has been placed upon the guidance of this Court's judgment "by objective factors to the maximum possible extent," *Enmund v. Florida*, *supra* at 788, quoting *Coker v. Georgia*, *supra* at 592, the range of interpretation of these "objective" circumstances has been striking.<sup>9</sup> These facts, and the pernicious consequences of the finding by this Court of an illusory consensus, *Gregg v. Georgia*, *supra* at 176, compel the highest threshold of proof on the part of those who would attack a legislative enactment as violative of "evolving standards of decency." *Id.* at 175.

8. "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion), quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). "[B]oth in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency." *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting), quoting the brief of petitioner in *Aikens v. California*, No. 68-5027.

9. See, e.g., *Tison v. Arizona*, *supra*, 107 S.Ct. at 1696-1697 (Brennan, J., dissenting); and *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2716 (dissent), regarding the significance to be accorded states which do not have a capital punishment statute.

Such a standard, by definition, must not be merely a widely-held opinion but a "society-wide consensus" on the issue presented. *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2706 (O'Connor, J., concurring in judgment; hereinafter cited as "concurrence"). Absent the "most reliable signs" of such a consensus, one should not be found. *Id.*

Significantly, there is evidence of a society-wide consensus that persons who commit murder below a certain age should not be punished by death for their crimes. No ten-year-old murderers are on any Death Row, and no person of this age has been executed in the United States for more than a century. V. Streib, *Death Penalty for Juveniles* 57 (1987), hereinafter cited as "Streib." The last execution of a person who killed while under age fourteen took place in 1927. *Id.* at 57, 219. Of those youthful murderers now under sentence of death, or who received such a sentence in the past five years, all committed their crimes when at least fifteen and most at sixteen or older. *Id.* at 28-29, 173-176. These facts, and the legislation discussed below, suggest that at some point in the age range between ten and thirteen, a national consensus has formed that executing a youthful defendant would always be "indecent," even though he has committed an intentional killing and whatever the circumstances of that crime.<sup>10</sup>

Since no execution is in prospect for any person committing murder at the above ages—very likely because

10. Even here, a "bright line" is somewhat elusive, since it would appear that criminal juries are very seldom presented with persons fourteen or younger who have been found to have killed with an intent sufficient to permit a sentence of death. In 1987, only 189 individuals of this age were arrested for "murder and nonnegligent manslaughter" in the entire United States. 1987 Uniform Crime Reports: Crime in the United States 174 (United States Department of Justice), hereinafter cited as "Uniform Crime Reports."



of the very societal consensus which this Court seeks—the Eighth Amendment challenges have of necessity focused upon those older murderers approaching the age of eighteen who, statistics suggest, are responsible for a significant percentage of the homicides committed in this country.<sup>11</sup> Respondent submits that no objective basis exists for this Court to find a national consensus against the execution of those who commit intentional murder at age sixteen, and further that such executions serve the same legitimate penological purposes as those imposed upon persons who kill when they are seventeen, eighteen or older.

## **II. No Society-Wide Consensus Exists That Those Who Commit an Intentional Murder at Age Sixteen Should Not Be Subject to Capital Punishment**

### **A. Public Views As Reflected by “Minimum Age” Statutes**

The first factor which has been cited by this Court in its analyses of current standards of decency is the judgment of the various legislatures on the matter in question. *Thompson v. Oklahoma, supra*, 108 S.Ct. at 2691 (plurality opinion of Stevens, J.; hereinafter cited as “plurality”). This has been described as the “most reliable” sign of public attitudes, *Id.*, 108 S.Ct. at 2715 (dissent), and it may well be so. If any entity may be said to reflect the views and standards of the public, it must be their elected representatives. *Gregg v. Georgia, supra* at 175-176.

Of the 36 states which currently authorize the death penalty, 22—well over half—permit the execution of a person who commits an intentional murder at age sixteen

11. Sixteen-year-olds alone comprised 3% of the total number of those arrested nationally for murder and nonnegligent homicide in 1987, and seventeen-year-olds added another 4%. *Id.*

or younger. Respondent's Appendix B.<sup>12</sup> Petitioner strives mightily to overcome this fact by including in his evaluation those jurisdictions in which no provision for capital punishment exists, and by simply ignoring those jurisdictions in which the age limitation does not appear in the death penalty statutes themselves (Pet.Br. 29).<sup>13</sup> In light of this effort, and given the position of the concurrence in *Thompson v. Oklahoma, supra*, respondent offers the following discussion with regard to the pertinent “legislative judgments.” *Enmund v. Oklahoma, supra* at 788.

### **1. Jurisdictions With No Current Death Penalty**

Petitioner seems to presuppose that any state without a current death penalty statute has necessarily expressed its hostility to capital punishment, and further that this purported public attitude demonstrates a considered judgment that persons under 17 should never be executed (Pet.Br. 29). Neither assumption is valid. It may come as a surprise to the legislative assemblies and citizens of such states as New York, Massachusetts and Kansas that they are recorded by petitioner as in opposition to capital punishment, when all three legislatures have re-

12. In addition, as noted by the dissent in *Thompson*, such executions are permitted for some federal crimes. *Id.*, 108 S.Ct. at 2715. Although legislation is pending in the House of Representatives which would limit the imposition of death sentences for the murder of law enforcement officers to those eighteen or older at the time of the crime, 134 Cong.Rec. H7272-H7274, H7281-H7282 (September 8, 1988), it has yet to become law and in any event would reflect only a judgment that those who commit this particular species of homicide should not suffer death if less than eighteen.

13. Petitioner thus appears to assert simultaneously that (a) legislatures of states in which no execution is possible at any age have taken a position on the appropriateness *vel non* of executing juvenile killers; while (b) legislatures which have passed statutes which actually govern such capital proceedings have not. The inconsistency in such an argument is breathtaking, and becomes even more so when the latter statutes are examined.



peatedly enacted death penalty legislation which was later vetoed by the state's chief executive or overturned by state courts on state constitutional grounds.<sup>14</sup> Even aside from this, petitioner fails to explain what occasion would exist for considering the nature and status of juveniles when prohibiting executions irrespective of age; or why this unsupported assumption should be adopted as a "reliable" objective indicator of public views on the present issue. In past Eighth Amendment analyses involving capital punishment, majority opinions of this Court have reviewed legislation in those jurisdictions in which the death penalty was then available. *Enmund v. Florida*, *supra* at 789-793; *Tison v. Arizona*, *supra*, 107 S.Ct. at 1685-1686. The same principle should apply here.

## 2. Juvenile Transfer Statutes Generally

When a similar analysis was conducted by this Court in *Thompson v. Oklahoma*, *supra*, it was noted that in 19 states the minimum age at which one could receive the death penalty derived from juvenile statutes setting a minimum age at which a juvenile could be prosecuted as an adult, and not from a specific provision in the state's capital punishment statute. *Id.*, 108 S.Ct. at 2694-2695 (plurality).<sup>15</sup> The plurality elected to disregard these jurisdictions in its legislative review. *Id.*, 108 S.Ct. at 2695-2696. The concurrence expressed concern that

14. Polls in New York indicate that, in the face of the Governor's "continuously-exercised" veto, 80-85% of persons of voting age support the death penalty. Lane, "Legislative Process and Its Judicial Renderings: A Study in Contrast," 48 U.Pitt.L.Rev. 639, 643 (n. 14) (1987). For an account of the Massachusetts experience, which has included not only repeated capital punishment legislation but a state constitutional amendment passed for the express purpose of upholding this penalty, see *People v. Drake*, 748 P.2d 1237, 1262-1263 (Colo. banc 1988) (concurring opinion).

15. Since Vermont no longer has a death penalty for homicide, 13 Vt.Stat. Ann. §2303(a) (Cum.Supp. 1988), the number of these jurisdictions is now 18.

this Court had not been shown evidence that the legislatures had "directly considered" the capital punishment ramifications of these laws and, based upon the absence of affirmative proof of a deliberate choice, held that the Eighth Amendment barred executions of fifteen-year-old murderers unless a minimum age appeared specifically in the capital punishment statute. *Id.*, 108 S.Ct. at 2707-2708, 2711.

As discussed below, respondent submits that substantial evidence has been overlooked that the legislatures in question intended precisely what they enacted, and that the unprecedented significance accorded to the placement of these laws in the statute books is unwarranted. Even were this not so, however, respondent would note its emphatic dispute with the notion that such independent proof of intent is required, or ought to be required, for purposes of Eighth Amendment analysis. By definition, this Court's examination of objective indicators for "evolving standards of decency" rests upon *presumptions*: with regard to legislation, the necessary presumption is that legislators pass laws in accordance with the opinions and standards which prevail among those who elected them. While this is valid as a general assumption, it is by no means always true, particularly in such deeply emotional and divisive areas as capital punishment where legislators may tend to vote their personal views.<sup>16</sup> Nevertheless, the presumption has sufficient general validity when applied to *national patterns* of legislation, as opposed to individual laws, which is all that is required for Eighth Amendment analysis of public standards of decency. To require "proof" that lawmakers voted according to the views of their constituents would be the same as eliminating legislation as a factor for this Court to consider, since such proof could never

16. For an example of this phenomenon involving capital punishment, see Lane, cited *supra* at note 14, at 643.

be supplied.

The same principles apply to the juvenile transfer statutes at issue in this case. It may certainly be said that all possible ramifications of a law may not be considered at the time of its passage. However, it is particularly difficult to presume that, in passing a law subjecting juveniles to general criminal prosecution, legislators were oblivious to the fact that capital punishment was an available criminal penalty in their jurisdiction. By its very nature, the death penalty has always been a sanction very much in the public eye: it is associated with the most heinous and notorious criminal cases, and has been the subject of longstanding public debate. By the same token, public attention has been called to the issue of executing juveniles by a number of cases in many states in which persons of this age have received sentences of death; indeed, this Court has encouraged such attention and debate since at least 1982, when it first granted review on this very issue. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); see also *Bell v. Ohio*, 438 U.S. 637 (1978), in which a similar claim was raised but not decided. In short, it is implausible (to say the least) to suggest that a legislature which enacted a law permitting the criminal prosecution of juveniles as adults failed to contemplate that these individuals might thereby receive a sentence of death—let alone to presume such an oversight by the legislatures in 18 states.

A second dispute with the approach taken by the concurrence in *Thompson* is that it seems to assume that legislators' reflection of and responsiveness to public views terminates after a law is passed. To choose a vivid and obvious example, if a legislature were somehow to pass a law which permitted the practice of human sacrifice—and whether or not the lawmakers were aware at the time of passage that this was the effect of their legislation—there

can be no doubt that public response would ensure its speedy repeal, most especially so if in the interim human sacrifice had been practiced. To demand affirmative proof of legislative purpose at the time of its enactment overlooks the fact that it is society's views which this Court is ultimately seeking to identify, not the legislature's, and that these views may be shown not only by the passage of a law but also by its continued existence and exercise. As discussed below, examples abound in which sentences of death upon youthful killers has led to a modification of the minimum age at which death sentences are permitted.

For all of the above reasons, respondent submits that it is at least as reasonable to presume that the minimum ages set out in juvenile transfer statutes were intended to extend the possibility of capital punishment to juveniles as it is to presume—as this Court has and must—that legislative acts reflect public standards. If presumptions of this character are not made, then any "objective" aspect of this Court's evaluation of the purportedly evolving standards of society vanishes.

### 3. Juvenile Statutes Which Refer to the Death Penalty or a Capital Offense

Further evidence against presuming that legislatures enacting juvenile certification laws did not consider the possibility of sentencing juveniles to death, or in counteracting such a presumption if it were indulged in, arises from a review of the pertinent statutes. The Florida statute providing for the trial of juveniles as adults, for example, states in pertinent part as follows:

"1. A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court as set forth in §39.06(7) unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition



for delinquency, if any, shall be dismissed. The child shall be tried and handled in every respect as if he were an adult:

a. On the offense *punishable by death* or by life imprisonment. . . .

\* \* \*

3. If the child is found to have committed the offense *punishable by death* or by life imprisonment, *the child shall be sentenced as an adult.*" (Emphasis supplied). Fla.Stat. Ann. §39.02(5)(c) (Supp. 1988).

One could scarcely question, upon reading this statute, that the legislature contemplated and fully intended that juveniles could be sentenced to death if convicted of a capital murder under Florida law. Yet this and every other juvenile transfer statute was disregarded by the plurality and the concurrence in *Thompson*, and the sweeping language in the concurring opinion that the minimum age must appear in the "capital punishment statute" (*Id.*, 108 S.Ct. at 2711) would seem to consign it to constitutional oblivion.

Similar strong evidence of the legislature's intent is presented by those juvenile statutes which set a variety of minimum prosecution ages according to the seriousness of the crime charged, and expressly include that state's capital homicide within this scheme. For example, Montana law provides that a juvenile may be charged as an adult for such offenses as negligent homicide, arson, assault or robbery only if he was at least sixteen years of age at the time of the conduct alleged. Mont.Code Ann. §41-5-206(1)(a)(ii) (1987). However, this minimum age is reduced to twelve for those charged with deliberate homicide—the only capital offense in Montana, Mont.Code Ann. §45-5-102 (1987)—and several other homicide and sexual offenses. §41-5-206(1)(a)(i). To the same effect are 10 Del.Code Ann. §938(a) (1975), which states a minimum prosecution age of sixteen except for those charged with

the capital crime of first degree murder, 11 Del.Code Ann. §§636 and 4209 (Repl. 1987), and two other offenses; La. Rev.Stat. Ann. §13:1570(A)(5) (1986), permitting the criminal prosecution at fifteen of those who commit the capital offense of first degree murder, La.Rev.Stat. Ann. §14:30 (1986), and other degrees of homicide or rape while reserving other prosecutions for those over sixteen; and S.C.Code Ann. §20-7-430 (1985), which sets several age limits for different charges and circumstances but expressly excludes from such age limitation charges of "murder or criminal sexual assault." Once again, no credible reason appears for assuming that a legislature which expressly provides that a juvenile may be tried for a crime carrying the death penalty somehow failed to contemplate the possibility of a sentence of death.

#### 4. States Which Expressly Recognize the Importance of Age in Capital Sentencing

A similar difficulty arises in presuming that legislatures gave no thought to the possibility of death sentences for juvenile murderers when most of the jurisdictions in question have enacted statutes which specifically acknowledge the link between the defendant's age and the appropriateness of capital punishment. Of the 36 states with capital punishment, 29 expressly list the defendant's age as a mitigating factor to be considered when appropriate. Respondent's Appendix C. Fourteen of the 18 jurisdictions in which the minimum execution age is stated in the juvenile transfer statute have passed such a provision.<sup>17</sup> Even when the juvenile statute does not on its face reflect consideration of capital punishment, as in the examples discussed previously, it is manifestly inconsistent and im-

17. Alabama, Arizona, Arkansas, Florida, Louisiana, Mississippi, Missouri, Montana, Pennsylvania, South Carolina, Utah, Virginia, Washington and Wyoming.



plausible to suggest that legislators on the one hand considered the defendant's age in the context of the death penalty, yet on the other hand ignored the death penalty when passing a criminal statute relating to the defendant's age.

#### 5. Laws in Jurisdictions Where Persons Age Sixteen or Under Have Been Sentenced to Death

As phrased by the concurrence in *Thompson*, the juvenile transfer statutes under discussion here make capital punishment "at least theoretically applicable" to persons who commit a capital homicide at age fifteen. *Id.*, 108 S.Ct. at 2707. However, the experience of a number of these states has been considerably less theoretical than this language suggests, and legislatures have displayed considerable sensitivity to public attitudes in adjusting minimum-age statutes after actual experience. In 1986, a fifteen-year-old female was sentenced to death for murder in Indiana. Streib, *supra* at 174. Less than a year later, the Indiana legislature passed a bill amending the murder statute to prohibit sentences of death for those persons under age sixteen when the crime was committed. Ind. Code Ann. §35-50-2-3(b) (Supp. 1988), as effective September 1, 1987. Similarly, Kentucky raised its minimum age to sixteen following a death sentence given a fifteen-year-old, *Ice v. Commonwealth*, 667 S.W.2d 671, 672 (Ky. 1984); Ky.Rev.Stat. Ann. §640.040(1) (Supp. 1987), as effective July 1, 1987; and North Carolina greatly restricted the circumstances in which persons who commit murder under age seventeen could be sentenced to death following a death sentence upon a fifteen-year-old killer. Streib, *supra* at 176; N.C.Gen.Stat. §14-17 (Supp. 1987), as effective July 29, 1987.

Of the 18 jurisdictions in which the minimum age for execution is currently stated in the juvenile transfer stat-

utes, eight<sup>18</sup> have had at least one defendant under sentence of death since 1982 for murders committed at age sixteen or younger. Respondent's Appendix B; Streib, *supra* at 28-29; Petitioner's Appendix C. Missouri is one such jurisdiction.<sup>19</sup> If petitioner's thesis is correct that the execution of such persons is beyond the pale of "evolving standards of decency," one would certainly expect in light of the above experience that public opprobrium would have resulted in the repeal of at least one of the statutes permitting such executions in these eight states. Not only has this not occurred, but six of these eight jurisdictions (excluding Alabama and Arkansas) have enacted or amended these statutes between 1980 and 1988 *without change* in the pertinent minimum age provision.<sup>20</sup>

#### 6. Death Penalty Statutes Stating a Minimum Age

It is undisputed that those jurisdictions with death penalty statutes which expressly state an age below which one who commits murder cannot be sentenced to death are highly relevant to the present issue. Four states with statutes of this type (Indiana, Kentucky, Nevada

18. Alabama, Arkansas, Florida, Louisiana, Mississippi, Missouri, Oklahoma and Pennsylvania.

19. Additional evidence with regard to the intent of the Missouri General Assembly should be noted. Although this state's capital punishment laws as enacted in 1977 were taken directly, and to some extent verbatim, from the law of the State of Georgia, compare Mo.Rev.Stat. §565.012.2 (1978) (repealed effective 10-1-84) with the equivalent Georgia statute cited in *Gregg v. Georgia*, *supra* at 165 (n. 9), Missouri did not adopt Georgia's statute limiting execution to those committing murders at age seventeen or older, which was also in effect at that time. Ga.Code Ann. §17-9-3 (1982); see 1963 Georgia Laws at 122.

20. Of the 18 states with juvenile transfer statutes which permit the execution of persons who commit murder at age sixteen or below, 12 have passed or amended their statutes on this subject between 1980 and 1988: Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia and Wyoming.

and North Carolina) permit the imposition of such sentences upon killers age sixteen or below. All four of these statutes have been passed or amended in the last three years. Thus, petitioner's thesis that the standards of American society have recently "evolved" to exclude the possibility of his execution is directly contradicted by the above legislation.

### B. Public Views As Reflected in Other Statutes

Considerable significance was accorded by the plurality in *Thompson v. Oklahoma, supra*, to age limitations on matters having nothing to do with criminal prosecution or capital punishment. *Id.*, 108 S.Ct. at 2692-2693, 2701-2706. Petitioner has gone to prodigious lengths to set out each and every Missouri statute which states a minimum age for some activity, with the specified ages ranging from four to twenty-one (Pet.Br. 28; Petitioner's Appendix H). No doubt this exercise could be performed in any other jurisdiction.

The significance of these laws as "reliable" objective indicators of public attitudes regarding the execution of youthful killers is nonexistent. In the first place, as correctly noted by the *Thompson* dissent, *Id.*, 108 S.Ct. at 2718 (n. 5), statutory age limitations are directed to the particular status or activity to which that statute pertains—that is the very reason why so many different minimum ages exist. In Missouri, for example, one is presumed to be a competent witness in many criminal cases at age ten,<sup>21</sup> may be held criminally responsible for one's acts at fourteen,<sup>22</sup> can receive a driver's license at sixteen,<sup>23</sup> yet cannot vote or marry without parental

21. Mo.Rev.Stat. §491.060(2) (1986). For some classes of crimes, a person of any age may testify.

22. Mo.Rev.Stat. §211.071 (1986).

23. Mo.Rev.Stat. §302.060(2) (1986).

consent until age eighteen<sup>24</sup> and cannot sit on a jury until age twenty-one.<sup>25</sup> How can these age limits be divorced from the conduct they govern? Would petitioner seriously suggest (for example) that the fact that fourteen-year-olds may be criminally prosecuted throws some light upon the views of the Missouri populace as to the age at which a youth may vote? If such a profoundly speculative and unsupported analysis were to be undertaken, what particular minimum age statute particularly represents societal standards as to the "right" age to capitally punish youthful killers? To say the very least, such an attempt is considerably more tenuous than the presumption which the plurality and concurrence in *Thompson* declined to make: that the legislatures which enacted juvenile transfer statutes intended to allow those tried as adults to receive the full range of available criminal penalties, including capital punishment.

The second major defect in petitioner's reliance upon general age limit statutes is that he completely fails to distinguish between two different types of these provisions: those which deal with age groups purely as a class and those which require inquiry into each individual of the specified age. No matter how intelligent, sophisticated and well-informed a seventeen-year-old may be, he is not permitted to vote in any state in the Union; no provision exists in any jurisdiction for exceptions to the voting age restriction on this or any other ground. The same applies to jury service, purchase or consumption of alcohol, and virtually all of the age limitations listed in petitioner's Appendix H. Of necessity, these statutes reflect a legislative judgment that *most* persons

24. Mo.Const., Art. VIII, §2 (as amended 1974); Mo.Rev.Stat. §451.090.2 (1986).

25. Mo.Rev.Stat. §494.010 (1986).



of the designated age are competent to perform the designated activity or bear the specified responsibility.

In sharp contrast are those few statutes that simply provide the possibility that youths of a given age will be treated as adults, the principal example being juvenile transfer statutes. These provisions need not rest on assumptions as to the competency or responsibility of a particular age group as a class, since each individual will be separately evaluated according to specified judicial or legislative criteria. Thus, if it can be contemplated that *any* person of a particular age might warrant treatment as an adult, inclusion of that age in the juvenile transfer statute is appropriate. Significantly, the minimum ages at which a juvenile may be prosecuted as an adult are considerably lower than categorical limitations such as when a person may vote and, as noted by the dissent in *Thompson*, the trend is to reduce such minimum ages still lower. *Id.*, 108 S.Ct. at 2716 (n. 3).

Beyond dispute, the age limitation under review by this Court is of the latter character. Like any sixteen-year-old killer under sentence of death in any state, Heath Wilkins was not selected at random off the street to receive this penalty. Rather, he was the subject of individualized consideration as to whether he should be prosecuted as an adult (J.A. 4-6), and as to whether he committed the murder for which he was charged (J.A. 76-77). Even after being found guilty, he was not automatically sentenced to death, but received a punishment hearing at which factors in aggravation and mitigation of punishment, including his age, were considered. That being the case, it is fallacious and misleading for petitioner to rely upon statutes which treat sixteen-year-olds as a class, and further which have nothing whatever to do with the criminal prosecution or capital punishment of such individuals.

### C. Public Views As Reflected by Jury Verdicts

"The second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries." *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2697 (plurality).<sup>26</sup> In order for jury verdicts to serve as an "objective" indicator of public standards, the presumption of this Court must be that if death sentences are returned proportionately less often for those who commit murders at age sixteen than for murderers as a whole, this would provide evidence that society in general considers the execution of sixteen-year-old killers to be "indecent."

Respondent disputes this thesis. The youth of the defendant may be considered as a mitigating factor in any jurisdiction. *Eddings v. Oklahoma*, *supra*, and the vast majority of states expressly list it as one in their capital punishment statutes. Respondent's Appendix C. Just as legislatures have focused in particular upon the age of the defendant as a mitigating circumstance, juries may well have concluded that age is a particularly important mitigating factor in the case of a defendant who commits murder at age sixteen, and that only the most compelling circumstances in aggravation will overcome this consideration. Such a conclusion would have nothing to do with the proposition that executing sixteen-year-old murderers is inherently unacceptable, yet it also would lead to a proportionate reduction in persons of this age under sentence of death. This conceptual defect in analyzing jury ver-

26. Although this Court has repeatedly made reference to "juries" imposing death sentences, respondent finds no indication that it has separated out those capital cases in which the sentence was imposed by a judge. See *Enmund v. Florida*, *supra* at 794-796; *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2697-2698. Absent any means of determining which capital sentences were returned by a jury and which by a judge alone, respondent will review these sentences as a whole.



dicts has been noted but not resolved in past decisions of this Court. *Gregg v. Georgia*, *supra* at 182; *Coker v. Georgia*, *supra* at 597; *Enmund v. Florida*, *supra* at 819 (O'Connor, J., dissenting); *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2717-2718 (dissent). Unless some means were to exist to distinguish between a judgment that death sentences for those who kill at age sixteen should rarely be imposed, and a judgment that these sentences are abhorrent in the eyes of society, it is difficult to view punishment verdicts as an "objective" indicator of evolving standards of decency under the Eighth Amendment.

Even aside from this difficulty, respondent finds no instance in the past decisions of this Court, including *Thompson v. Oklahoma*, *supra*, in which it was shown that juries were actually less likely to return a death sentence upon a challenged class than they were upon capital defendants as a whole. Most frequently, all that has been offered are statistics indicating that the class was a small percentage of those on Death Row or of those who had been executed. *Enmund v. Florida*, *supra* at 794-796; *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2697. Yet these figures are meaningless if not positively misleading without some knowledge of the juries' opportunity to impose a death sentence upon members of the challenged class as compared with defendants generally. A vivid example of this involves the number of women under sentence of death. As of August 1, 1988, there were 22 women on Death Rows nationally and more than two thousand men. "Death Row, U.S.A.," NAACP Legal Defense and Educational Fund, Inc. (August 1, 1988). A superficial look at these figures would permit an argument that juries refuse to sentence women to death and have thus strongly indicated societal revulsion at this practice. The unreliability of this conclusion, and the misleading character of the above statistic, is demonstrated by indications that the vast

majority of persons prosecuted for homicide are men.<sup>27</sup> By the same token, whatever public views may be on the execution of those who commit murder at age sixteen, they are not shown simply by the number of such persons under sentence of death.

### 1. Persons Under Sentence of Death Nationally

The sole "reliable" means of determining whether punishment juries were disproportionately reluctant to impose sentences of death upon sixteen-year-old killers is to find the percentage of cases in which, when the death penalty is sought against those who commit murder at age sixteen, that penalty was actually imposed; and to compare that with the same percentage of defendants of all ages. See *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2708 (conurrence). The brief of petitioner offers nothing of the kind, but rather the customary and meaningless litany of how few persons who commit murder at sixteen are on Death Row (Pet.Br. 32).

The only attempt known to respondent to evaluate jury sentences in light of jury opportunities to sentence appears in the plurality opinion of *Thompson v. Oklahoma*, *supra*, in which such sentences are compared with arrests for murder or nonnegligent homicide. *Id.*, 108 S.Ct. at 2697 (n. 39). The difficulty with this comparison (aside from the obvious fact that the vast majority of those arrested for these crimes never reach the stage at which capital punishment is or could be sought) is that it is inherently skewed against juveniles. Unlike adults, an unknown percentage of persons of juvenile age, even those accused of some degree of homicide, will remain in the juvenile justice system and thus will never be eligible for any criminal penalty. Obviously, this is not true of adults. Thus the

27. In 1987, for example, 88% of all persons arrested for murder or nonnegligent homicide were men. 1987 Uniform Crime Reports at 181.

proportion of sixteen-year-old arrestees who might eventually be considered as appropriate subjects for the most severe criminal penalty will inevitably be smaller than that of persons of all ages.

In short, no showing has ever been made that (a) juries in capital cases have been particularly reluctant to sentence sixteen-year-old murderers to death; or (b) if this had been established, that it would be an expression of a societal consensus that such sentences are unacceptable rather than the proper consideration of the defendant's youth as an important factor in mitigation of punishment. Without proof—or at the very least some relevant evidence—as to both propositions, the “behavior of juries” cannot possibly be an objective factor in evaluating the current scope of the Eighth Amendment.<sup>28</sup>

## 2. The Missouri Experience

Lacking any evidence of a national reluctance on the part of sentencing juries to return death sentences upon those sixteen-year-olds who commit a capital homicide, petitioner seeks such evidence in cases tried in the State of Missouri. In Missouri, summaries are required to be kept of all capital cases to facilitate the Supreme Court of Missouri's proportionality review, Mo.Rev.Stat. §565.035.6 (1986), and petitioner has employed these summaries to list each and every case in which a capital charge was filed against a defendant for homicides committed at age sixteen or younger (Pet.Br. 31; see the petitioner's brief in *High v. Zont*, No. 87-5666, Appendices S and T).

28. For the above reasons, and further because they are distant and collateral to the subject under discussion, the “behavior of juries,” respondent discounts the statistics regarding actual executions. See *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2717-2718 (dissent). Given the extraordinary delays in the carrying out of death sentences, and the relatively small proportion of sixteen-year-old murderers on Death Rows nationally (Petitioner's Appendix E), it is hardly surprising that such executions are an uncommon occurrence.

Since the reimposition of capital punishment in Missouri in 1977, there have been only three opportunities in this state to consider whether particular individuals who were found guilty of capital homicide for crimes committed while age sixteen or younger should be sentenced to death. In the case at bar, petitioner was sentenced to death for reasons which amply appear of record. In two other cases in which the death penalty was sought for murders committed at the same age, juries returned sentences of life imprisonment. *State v. Allen*, 710 S.W.2d 912 (Mo.App., W.D. 1986); *State v. Scott*, 651 S.W.2d 199 (Mo.App., W.D. 1983).<sup>29</sup> Viewing capital prosecutions in Missouri as a whole, the Missouri Supreme Court's case summaries indicate that juries have had 138 opportunities to consider whether a sentence of death should be imposed, and have returned such a sentence in 66 of these instances, 48% of the time.

While petitioner may wish to argue that only “one-third”—one out of three—of those his age received a death sentence, this is manifestly too small a sample to permit an evaluation of public views in this state. If anything, the fact that only 3 out of 138 Missouri cases in which a death penalty was sought involved a sixteen-year-old defendant greatly assists in explaining why few persons committing capital homicides at this age are under a sentence of death.

29. Petitioner does not explain what possible relevance exists in his listing of cases in which the juries were not permitted to consider a sentence of death because the defendants were acquitted or convicted of noncapital crimes (Pet.Br. 31). Nor does a scintilla of evidence exist that the decisions to waive the death penalty cited in his brief rested upon the age of the defendant. According to the capital case summaries promulgated by the Missouri Supreme Court, the death penalty has been waived in 39% of all first degree murder prosecutions since 1977—slightly higher than the percentage of such waivers for murderers of petitioner's age as listed in his brief (Pet.Br. 31).



For the reasons discussed above, no basis exists for a finding that patterns of jury verdicts support petitioner's Eighth Amendment claim.

#### D. Other Purported Measures of Public Views

Finally, resort is made to a number of other factors which, it has been claimed, throw some light upon "evolving standards of decency" in the United States as pertaining to cruel and unusual punishment. Pet.Br. 33-34; see *Enmund v. Oklahoma*, *supra* at 796 (n. 22); and *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2696 (plurality).

##### 1. Statements of Professional or Interest Groups

In the plurality opinion of *Thompson*, reliance was placed upon the views of "respected professional organizations" which had stated their opposition to the execution of those who committed murder below a certain age. *Id.* Petitioner cites these and similar organizations (Pet.Br. 33). Unsurprisingly, a large number of other groups, most of which oppose capital punishment at any age, have volunteered their services in performing this analysis. See, e.g., the *amicus curiae* brief of the American Baptist Churches, *et al.*, at 26-38.

If this Court were making a legislative judgment as to whether those who commit a capital homicide at age sixteen should be eligible for the death penalty, the views of "respected professional organizations" might well be relevant, both as arguments on the merits of the proposed legislation and as an expression on behalf of the small segment of society which such groups represented. However, it has nowhere been explained how the views of individual interest groups are reliable "objective factors" in judging whether a national consensus exists against the execution of sixteen-year-old killers. By definition, positions taken on behalf of a particular organization represent

(at best) the opinion of its members, not society as a whole.<sup>30</sup> Since no need exists for those entities which approve of an existing practice to formally state that fact, resolutions of this character inevitably represent the voices in opposition.

As this Court has acknowledged, it is not designed or intended to reflect the views of society, as are legislative or other representative bodies. *Gregg v. Georgia*, *supra* at 175-176. In paying heed to these groups which have gone to the effort of expressing formal opposition on the present issue—particularly those whose expressions seem timed and tailored to influence the judgment of this Court (see Pet.Br. 33)—it runs an unjustifiable risk of mistaking the clamor of organized protest for a settled national consensus.

##### 2. Polls

It has been suggested that the utility of public opinion polls in ascertaining standards of decency "cannot be very great." *Furman v. Georgia*, *supra* at 361 (Marshall, J., concurring). Whether or not this is so, no survey cited by petitioner or known to respondent supports a finding of a prevailing "standard of decency" against the execution of youthful murderers. Although no known national poll has been conducted on this subject for more

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30. Respondent finds no contrary assertion in the *amicus curiae* brief of the American Bar Association, one of the organizations relied upon by the plurality in *Thompson*. Claims by other amici to represent the views of society (see the *amicus curiae* brief of the American Baptist Churches, *et al.*, at 26-38) vividly demonstrate the unreliability of the present analysis. Despite the fact that virtually all of these entities have stated their categorical opposition to capital punishment (*Id.* at 4-18), this Court has recognized on the basis of ample objective evidence that the views of society are decisively to the contrary. *Tison v. Arizona*, *supra*, 107 S.Ct. at 1686; *Gregg v. Georgia*, *supra* at 176-182.



than twenty years,<sup>31</sup> recent surveys of particular geographic areas or professional groups generally indicate that between one-third and one-half of those questioned support such executions. Streib, *supra* at 33-34; Hill, "Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in *Eddings v. Oklahoma*," 20 Crim. Law Bull. 5, 17-18 (1984), hereinafter cited as "Hill." Assuming for the sake of argument that this represents the national view, the fact that more than one person in three supports the practice challenged by petitioner manifestly refutes the notion that a national consensus exists against the execution of those who commit a capital homicide at age sixteen.

The issue before this Court is not, as petitioner might have it, whether a majority of the public supports or opposes the death penalty in these circumstances, but whether it is "generally abhorrent to the conscience of the community." *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2697 (plurality). The available surveys of public opinion support the opposite conclusion.

### 3. Laws of Other Nations

This Court has stated that "[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.'" *Enmund v. Florida*, *supra* at 796 (n. 22), quoting *Coker v. Georgia*, *supra* at 596 (n. 10). It is difficult to dispute a proposition so strenuously qualified. Nevertheless, respondent submits that it is truly perilous for this Court to abstract the societal mores of

31. A 1965 Gallup poll, conducted while support for capital punishment was at its lowest ebb, found that only 45% of those responding supported the death penalty and 23% favored it for persons under twenty-one years of age. Streib, *supra* at 33. In a similar poll conducted in 1936, the same figures were 61% and 46%, respectively. *Id.* Support for capital punishment appears to have almost doubled since the 1965 poll. See, e.g., footnote 14, *supra*.

other nations, individually or collectively, and to attempt to apply them in finding "standards of decency" in the United States.

No better evidence could be supplied of the misleading character of this analysis than an examination of the countries cited as particularly significant by the plurality in *Thompson*: the nations of Western Europe and those others which share an Anglo-American heritage.<sup>32</sup> *Id.*, 108 S.Ct. at 2696. According to the *amicus curiae* brief of Amnesty International, 19 of these 22 countries have no death penalty for "ordinary" crimes (excepting offenses committed in wartime or some similar circumstance inapplicable to the case at bar), and the remaining three have had no executions for at least the past ten years. *Id.* at Appendix A-1 through A-7. If these figures were extrapolated to the United States, one would expect nationwide opposition to the imposition of capital punishment for any "ordinary" homicide. In fact, one finds precisely the opposite. *Tison v. Arizona*, *supra*; *Gregg v. Georgia*, *supra*.

The danger in such cross-national comparisons lies not only in substantial differences in culture and heritage, but in the very nature of crime in other countries. According to available figures, the per capita homicide rate in the United States would appear to be from two to ten times that of virtually all of the nations discussed above.<sup>33</sup> How can it possibly be said that this fact is

32. Respondent's list of these countries would consist of Australia, Austria, Belgium, Canada, Denmark, Finland, France, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and West Germany.

33. Landau, "Trends in Violence and Aggression: A Cross-Cultural Analysis," 22 *Annales Internationales de Criminologie* (International Annals of Criminology) 119, 130-131 (1984); Wolfgang and Zahn, "Homicide: Behavioral Aspects," 2 *Encyclopedia of Criminal Justice* 849, 850-851 (1983).

not of major significance in forming the attitudes of other countries with regard to capital punishment, or that the same judgment would be made if these nations had a comparable homicide rate? An additional difficulty of this kind arises with particular regard to the present issue of murders by juveniles: it has never been shown that similar problems exist in other countries, and some suggestion appears to the contrary.<sup>34</sup> If there is reliable objective evidence which establishes a consensus in the United States against the execution of sixteen-year-olds who commit a capital homicide, no need arises to examine the positions taken by other countries on the basis of their own national experiences. If no such consensus can otherwise be established, respondent submits that it cannot be shown by the stand taken on this issue by the legislative bodies of other nations. See *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2716-2717 (n. 4) (dissent).

#### 4. Treaties

Some forty years ago, the United States signed and ratified a treaty providing that persons under military occupation in time of war should not be sentenced to death for offenses committed under age eighteen. Geneva Convention Relative to the Protection of Civilian Prisoners in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560. Significantly, this prohibition applied only to certain foreign nationals in the hands of belligerents—signatories were free to execute others, as well as their own

34. "[I]n contrast to the pattern in the United States, the increase in crime found so prominently among the young people in Europe seems to have been concentrated among young adults between eighteen to twenty-five years of age instead of youths under eighteen." Ferdinand, "Crime Statistics: Historical Trends in Western Society," 1 *Encyclopedia of Criminal Justice* 392, 399 (1983).

citizens, without regard to age (*Id.* at 3520)—and the treaty governed only during a war or occupation (*Id.* at 3522).

Although this treaty has been cited as supporting petitioner's position, *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2707-2708 (concurrence), respondent fails to perceive why. Even if the United States were currently at war, every youthful murderer now under a sentence of death in this country, including petitioner, could be executed under the terms of this agreement. The treaty even permits the execution of the citizens of co-belligerents or neutrals without regard to age in some circumstances. 6 U.S.T. at 3520. In short, this treaty cannot reasonably be construed as expressing a view that persons under eighteen should never be punished by death for their crimes, but only that this should not be done in foreign territory forcibly occupied by a country at war. The distinction thus made is perfectly reasonable and utterly irrelevant to the issue before this Court.

Even greater difficulties attend efforts to rely upon treaties which the United States Senate has declined to ratify. Like any other form of legislation, the sole relevance of a treaty to the issue of "evolving standards of decency" is that it has been approved by the elected representatives of the people, who presumably did so in reflection of public views. *Gregg v. Georgia*, *supra* at 175-176. Absent any such approval, these agreements are at least irrelevant and at most evidence that no national consensus exists on the present issue.<sup>35</sup>

35. Since the issue was not pressed or passed on below and is beyond the scope of this Court's grant of certiorari, respondent will forbear to address the legal gymnastics performed by some amici curiae in arguing that this Court is powerless to uphold petitioner's sentence because the United States is bound by treaties it has not ratified. *Amicus curiae* brief of International Human Rights Law Group at 36-42. See Article II, Section 2 of the United States Constitution.



### III. The Execution of Sixteen-Year-Olds Who Have Committed a Capital Homicide Serves the Same Penological Goals as the Execution of Murderers of Any Older Age

Past decisions of this Court have indicated that, even when a particular punishment is accepted by society, it may nevertheless violate the Eighth Amendment because it is "grossly out of proportion to the severity of the crime." *Gregg v. Georgia*, *supra* at 173; see also *Enmund v. Florida*, *supra* at 788; and *Solem v. Helm*, 463 U.S. 277, 286-288 (1983). In this respect, it would appear, "it is for [this Court] ultimately to judge" whether a given penalty or class of penalties is contrary to Eighth Amendment guarantees as applied to the states through the Fourteenth Amendment. *Enmund v. Florida*, *supra* at 797. Past applications of this principle to capital punishment have involved classes of crimes or defendants for which, it was held, a sentence of death was never appropriate whatever the facts of any given case: non-homicide offenses, *Coker v. Georgia*, *supra*; defendants without an intent to kill, *Enmund v. Florida*, *supra*; and inmates who are insane at the time of execution, *Ford v. Wainwright*, *supra*. As did the plurality in *Thompson*, petitioner seeks to apply the same proportionality principles to a class concerning which the above argument cannot plausibly be made: those individuals guilty of an intentional murder who happen to have been no older than sixteen years and 364 days when they committed their crime.

No better evidence of the indefensibility of petitioner's position can be found than in the arguments presented and authorities cited in his brief. Petitioner does not even attempt to claim that he has isolated some mental processes or characteristics which are unique to those with a chronological age between sixteen and seventeen, nor has any evidence been offered that sixteen-year-olds are mentally

uniform as a class.<sup>36</sup> Instead, petitioner contents himself with vague generalizations about the purported thoughts of "normal adolescents" (Pet.Br. 37) and "juveniles" (Pet.Br. 38), without any effort to establish what must be shown to support his theory of proportionality: that sixteen-year-olds inherently have no understanding of the consequences of any of their actions, that none have the capacity to appreciate death, that they are incapable of acting other than impulsively, and the assortment of other theories advanced to distinguish these individuals on the basis of their chronological age.

The obvious fact that petitioner's assumption is untrue—that youths do not acquire a higher level of maturity on each succeeding birthday, in the manner of a snake shedding its skin—has been acknowledged by many authorities, including members of this Court. As stated, for example, by *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime* (1967),

"It is recognized that some youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age are emotionally and sometimes physically immature individuals . . . .

\* \* \*

No chronological age bracket is uniformly identical or entirely homogenous." *Id.* at 119-120.

See also *Fare v. Michael C.*, 442 U.S. 707, 734 (n. 4)

36. This argument is also contradicted by the amici curiae who support the position of petitioner. Aside from the fact that all amici propose a dividing line of age eighteen, in accordance with the position of *High v. Zant*, No. 87-5666, some make a point of noting that "[m]any of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s" (footnote omitted). Amicus curiae brief of the American Society for Adolescent Psychiatry, *et al.*, at 4.



(1979) (Powell, J., dissenting); and *Hill*, *supra*, 20 Crim. Law Bull. at 26 ("chronological age is an inherently poor criterion by which to determine actual maturity"). Because of this fact, petitioner's argument is not merely unsupported by this Court's past "proportionality" decisions, but actually promotes the infliction of capital punishment in an arbitrary and freakish fashion. *Gregg v. Georgia*, *supra* at 188-189. The decisions of this Court from *Gregg* onward have emphasized the importance of individualized consideration of each crime and offender based upon a broad range of evidence, to allow the sentencer "to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983). In particular, juries should be free to assess punishment according to the personal culpability of the defendant before them. *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2698 (plurality). Yet attempts to deal with sixteen-year-old killers "as a class" (*Id.*) while ignoring the absence of any uniform chronological age of maturity for individuals, thwarts these objectives: especially culpable murderers may be categorically excluded from consideration for the death penalty, while less blameworthy defendants may be eligible for this punishment, for no other reason than a difference of days or months in their dates of birth.<sup>37</sup>

37. This potential for injustice multiplies in crimes involving two or more defendants of different ages. A notorious example in England in the 1950's involved the conviction of sixteen-year-old Christopher Craig and nineteen-year-old Derek Bentley for the murder of a police officer. Because of a law prohibiting the execution of persons under eighteen, Craig was spared this punishment while Bentley was sentenced to death and executed, despite the fact that Craig had personally committed the killing and Bentley was in custody at the time of the officer's death. J. Christoph, *Capital Punishment and British Politics* 98-100 (1962). This case, and the conceptual difficulties in the arbitrary age distinction proposed by petitioner, are discussed at length in Hoffman, "On the Perils of Line-Drawing: Juveniles and the Death Penalty," to be published in 40 *Hastings L.J.*, Issue 2, in January of 1989.

A particularly piquant irony in petitioner's "proportionality" analysis involves the companion case of *High v. Zant*, No. 87-5666. In *High*, as in the case at bar, extensive argument is offered that High's conduct demonstrates why this Court should establish as a constitutional principle that capital punishment is always disproportionate for those who kill at age seventeen even though permissible at age eighteen or above. Long-distance evaluations are offered of petitioner High by psychological groups appearing as amici curiae which purport to justify this distinction. *Amicus curiae* brief of the American Society for Adolescent Psychiatry, *et al.*, at 16-17. Subsequently, however, evidence has been developed and filed by motion with this Court indicating that High may actually have been *nineteen* years of age when he committed the murder for which he was sentenced to death. Whatever High's actual age may turn out to be, the fact that petitioner would condition the "proportionality" of High's sentence of death solely upon which account one believes regarding his date of birth is ample refutation of his position.

If any response were necessary to the shibboleths offered by petitioner regarding the thought processes of "juveniles," it is supplied by the facts of the present case. Petitioner categorically asserts that the principle of retribution has no application to sixteen-year-old murderers because they act "impulsively" and out of an inability to control their emotions, and are therefore less culpable. Pet.Br. 36-38; see also *Thompson v. Oklahoma*, *supra*, 108 S.Ct. at 2699 (plurality). Yet petitioner's murder of Nancy Allen was neither impulsive nor emotional: he had planned to kill any and all witnesses to his robbery "a week or two" before he committed that crime (Tr. 126, 128, 219-220, 227). The statement by petitioner and the plurality in *Thompson* that those who kill at

age sixteen do not undertake the kind of risk-benefit analysis that would be relevant to the principle of deterrence in capital punishment, Pet.Br. 40-41; *Thompson v. Oklahoma, supra*, 108 S.Ct. at 2700, is contradicted by evidence in the present case of a perfectly rational, if depraved and callous, risk-benefit analysis conducted by petitioner:

"Q. Why did you feel you had to stab someone? Why did you do that?

A. No witnesses.

Q. No witnesses. What do you mean, no witnesses?

A. A dead person can't talk.

Q. That's why you—

A. And identify you.

Q. They can't identify you and that's why you did it?

A. Uh huh" (Tr. 127-128).

By his own account, petitioner decided in advance to commit murder in an attempt to evade punishment for robbery "if I got caught" (Tr. 128). This was not "risk-taking behavior" (Pet.Br. 37) but in fact an attempt to minimize risk. On its face, petitioner's testimony before the state Circuit Court refutes the claim that he did not contemplate the consequences of his actions or anticipate that he might be caught and punished (Pet.Br. 41).

The underlying theme of petitioner's brief appears to be that the very existence of juvenile courts signifies a judgment by society that juveniles are not fully responsible for their actions and should not suffer the same consequences as adults for their criminal acts (Pet.Br. 26-27). The obvious response, unaddressed by petitioner, is that every jurisdiction provides for circumstances in which juveniles may be criminally prosecuted as adults, and that this reflects a view that these

persons *may* be equally culpable in some circumstances. When such culpability is found, as in the case at bar, no basis exists to claim that capital punishment does not serve the same legitimate penological goals attributed to it in all other cases.

#### **IV. Petitioner May Not Present Additional Claims to This Court Which Were Not Pressed or Passed Upon Below or Which Are Not Fairly Included Within This Court's Limited Grant of Certiorari**

Petitioner's petition for a writ of certiorari was granted by this Court "limited to Question 1 presented by the petition." *Wilkins v. Missouri*, ..... U.S. ...., 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). This Question Presented was "Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States." Petition for a Writ of Certiorari at 3. Ignoring the above order, petitioner now advances three additional and distinguishable issues, none of which appeared in his certiorari petition and at least one of which has never been presented to any state court (Pet.Br. 43-49). This Court has generally declined to review claims beyond the scope of a grant of certiorari, see *Tison v. Arizona, supra*, 107 S.Ct. at 1682 (n. 2), and particularly so when the issue raised was not "pressed or passed upon" in the state courts below. *Heath v. Alabama*, 474 U.S. 82, 86-87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983). The issues improperly advanced by petitioner are briefly summarized below.

##### **A. Petitioner's Attack Upon His Juvenile Transfer**

For the first time in this Court, petitioner alleges that his certification for trial as an adult under the provisions



of Mo.Rev.Stat. §211.071 (1986) (Respondent's Appendix A) was invalid because the juvenile court purportedly did not make an "individualized consideration" of petitioner's maturity and responsibility (Pet.Br. 43-45).<sup>38</sup> Since petitioner did not bestir himself to offer this contention to the Missouri Supreme Court, the transcript of petitioner's juvenile certification hearing is not part of the record on appeal.

Even if the absent record were to bear out petitioner's factual assertions, and if this Court were to overlook its "longstanding rule" against considering claims not pressed or passed upon below, *Heath v. Alabama*, *supra*, respondent fails to perceive how the constitutionally-required principle of "individualized consideration" of capital defendants (Pet.Br. 43) has any possible relevance to a proceeding in which neither petitioner's guilt nor his punishment were determined. As the evidence shows (Tr. 194-301), and as the Missouri Supreme Court found, petitioner did receive such consideration in his punishment phase hearing as well as in the Supreme Court's proportionality review. *State v. Wilkins*, *supra* at 415-417 (J.A. 89-94).

### B. Petitioner's Attack Upon His Sentencing

Under Missouri capital sentencing procedure, taken from the Georgia law upheld in *Gregg v. Georgia*, *supra*, the only written finding required to be made by the trier

38. But see J.A. 5, in which the juvenile court made specific reference to petitioner's maturity. In the course of this argument, petitioner makes the astoundingly frivolous assertion that "[o]nce transferred to the courts of general jurisdiction, Heath Wilkins' age was irrelevant to the imposition and affirmation of his death sentence" (Pet.Br. 43-44). See Mo.Rev.Stat. §565.032.3(7) (1986) and *State v. Wilkins*, 736 S.W.2d 409, 415 (Mo. banc 1987) (J.A. 89-90), which state expressly to the contrary.

of punishment is an indication of the statutory aggravating circumstances found. Mo.Rev.Stat. §565.030.4 (1986). The Circuit Court in the present case made the required written finding and stated that "after considering all other proper and lawful matters" a sentence of death should be imposed upon petitioner (J.A. 77). On appeal to the Missouri Supreme Court, petitioner claimed that because the court had not expressly stated that he had considered mitigating circumstances, such circumstances had not been considered. The Missouri Supreme Court flatly rejected this allegation, noting in part that the Circuit Judge's report prepared pursuant to Mo.Rev.Stat. §565.035.1 (1986) specifically indicated the consideration of mitigating factors. *State v. Wilkins*, *supra* at 415-416 (J.A. 89-90).<sup>39</sup> Ignoring this ruling, and without even having advanced the present claim in his certiorari petition, petitioner restates the same discredited allegation in his brief and asserts that the court sentenced him to death merely because he asked for that penalty (Pet.Br. 30-31, 46-47).

Petitioner's obvious (though unacknowledged) analogy is to *Eddings v. Oklahoma*, *supra*, in which this Court granted review on the identical issue properly presented in this case but ruled on a claim not raised, that the sentencer had declined to consider the petitioner's violent background as a mitigating factor. *Id.* at 120 (Burger, C.J., dissenting). The procedural aspects of that case aside, *Eddings* involved an affirmative statement by the sentencing judge that he could not consider certain mitigating evidence, *Id.* at 109, 112-115, whereas the present record contains affirmative evidence that the court considered available mitigating circumstances, as well as a state court finding to that effect.

39. The report of the Circuit Court is part of the certified record on appeal before this Court.



### C. Petitioner's Attack Upon His Appellate Review

Finally, petitioner flatly misrepresents the Supreme Court of Missouri as holding that "his age at the time of the offense was irrelevant" (Pet.Br. 47). Not only is no such holding suggested by that court's opinion, in which petitioner's age as a possible mitigating factor was expressly discussed, *State v. Wilkins, supra* at 415-416 (J.A. 89-91), but three justices were so swayed by petitioner's age and related factors as to recommend a reduction of sentence. *Id.* at 417-423 (J.A. 95-106). Accordingly, respondent submits, petitioner's attempt to exceed the proper scope of review in this cause should be rejected.

### CONCLUSION

In view of the foregoing, the respondent submits that the decision of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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### APPENDIX A

Mo.Rev.Stat. §211.071 (1986), states as follows:

*"Certification of juvenile for trial as adult—procedure—misrepresentation of age, effect.—1. If a petition alleges that a child between the ages of fourteen and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law.*

*2. Upon apprehension and arrest, jurisdiction over the criminal offense allegedly committed by any person between seventeen and twenty-one years of age over whom the juvenile court has retained continuing jurisdiction shall automatically terminate and that offense shall be dealt with in the court of general jurisdiction as provided in section 211.031.*

*3. Knowing and willful age misrepresentation by a juvenile subject shall not affect any action or proceeding which occurs based upon the misrepresentation. Any evidence obtained during the period of time in which a child misrepresents his age may be used against the child and will be subject only to rules of evidence applicable in adult proceedings.*

*4. Written notification of a transfer hearing shall be given to the juvenile and his custodian in the same manner as provided in sections 211.101 and*

211.111. Notice of the hearing may be waived by the custodian. Notice shall contain a statement that the purpose of the hearing is to determine whether the child is a proper subject to be dealt with under the provisions of this chapter, and that if the court finds that the child is not a proper subject to be dealt with under the provisions of this chapter, the petition will be dismissed to allow for prosecution of the child under the general law.

5. The juvenile officer may consult with the office of prosecuting attorney concerning any offense for which the child could be certified as an adult under this section. The prosecuting attorney shall not divulge any information regarding the child and the offense until the juvenile court at a judicial hearing has determined that the child is not a proper subject to be dealt with under the provisions of this chapter.

6. A written report shall be prepared in accordance with this chapter developing fully all available information relevant to the criteria which shall be considered by the court in determining whether the child is a proper subject to be dealt with under the provisions of this chapter and whether there are reasonable prospects of rehabilitation with the juvenile justice system. These criteria shall include but not be limited to:

(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;

(2) Whether the offense alleged involved viciousness, force and violence;

(3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;

(4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;

(5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;

(6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

(7) The program and facilities available to the juvenile court in considering disposition; and

(8) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court.

7. If the court dismisses the petition to permit the child to be prosecuted under the general law, the court shall enter a dismissal order containing:

(1) Findings showing that the court had jurisdiction of the cause and of the parties;

(2) Findings showing that the child was represented by counsel;

(3) Findings showing that the hearing was held in the presence of the child and his counsel; and

(4) Findings showing the reasons underlying the court's decision to transfer jurisdiction.

8. A copy of the petition and order of the dismissal shall be sent to the prosecuting attorney.

9. When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, and the subject has been convicted in the court of general jurisdiction, the jurisdiction of the juvenile court over that child is forever terminated for an act that would be a violation of a state law or municipal ordinance.

10. If the court does not dismiss the petition to permit the child to be prosecuted under the general law, it shall set a date for the hearing upon the petition as provided in section 211.171."

Mo.Rev.Stat. §565.020 (1986), states as follows:

*"First degree murder, penalty.*—1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor."

## APPENDIX B

### STATE LAWS REGARDING THE MINIMUM AGE AT WHICH A DEFENDANT MAY BE SENTENCED TO DEATH

#### *No Age Specified*

ARIZONA: Ariz.Rev.Stat.Ann. §8-202 (1974); and Arizona Rules of Procedure for Juvenile Court, Rules 12 and 14.

DELAWARE: 10 Del.Code Ann. §938(a)(1) (1975); and 11 Del.Code Ann. §§636 and 4209 (Repl. 1987).<sup>1</sup>

FLORIDA: Fla.Stat.Ann. §39.02(5)(c)(1) (Supp. 1988).<sup>2, 3</sup>

OKLAHOMA: 10 Okla.Stat.Ann. §§1104.2 and 1112(b) (1987) (age 16 specified for murder, but may be prosecuted at younger age through juvenile certification process).<sup>3</sup>

SOUTH CAROLINA: S.C.Code Ann. §20-7-430(6) (1985).<sup>1</sup>

WYOMING: Wyo.Stat. §14-6-237 (1986).

#### *Age 10*

SOUTH DAKOTA: S.D. Codified Laws Ann. §§26-8-7 and 26-11-4 (1984).

#### *Age 12*

MONTANA: Mont.Code Ann. §§41-5-206(1)(a)(i) and §45-5-102 (1987).<sup>1</sup>

#### *Age 13*

MISSISSIPPI: Miss.Code Ann. §43-21-151(3) (Supp. 1987).<sup>3</sup>



## A6

### Age 14

ALABAMA: Ala.Code §12-15-34(a) (Repl. 1982).<sup>3</sup>  
 IDAHO: Idaho Code §16-1806(1)(a) (Supp. 1988).  
 MISSOURI: Mo.Rev.Stat. §211.071.1 (1986).<sup>3</sup>  
 NORTH CAROLINA: N.C.Gen.Stat. §§7A-608 and 14-17  
 (Supp. 1987) (age minimum 17 except in designated  
 circumstances).<sup>4, 5</sup>  
 PENNSYLVANIA: 42 Pa.Cons.Stat.Ann. §6355(a)(1)  
 (1982).<sup>3</sup>  
 UTAH: Utah Code Ann. §78-3a-25(1) (1987).

### Age 15

ARKANSAS: Ark.Code Ann. §§5-1-116(b) and 5-10-101  
 (1987).<sup>3</sup>  
 LOUISIANA: La.Rev.Stat.Ann. §§14:30 and 13:1570(A)  
 (5) (1986).<sup>1, 3</sup>  
 VIRGINIA: Va.Code Ann. §16.1-269(A) (Repl. 1988).

### Age 16

INDIANA: Ind.Code Ann. §35-50-2-3(b) (Supp. 1988).<sup>4, 5</sup>  
 KENTUCKY: Ky.Rev.Stat.Ann. §640.040(1) (Supp.  
 1987).<sup>4, 5</sup>  
 NEVADA: Nev.Rev.Stat. §176.025 (1987).<sup>3, 5</sup>  
 WASHINGTON: Wash.Rev.Code §§9A.32.030(2), 10.95.  
 020 and 13.40.110(1)(a) (1988 and Supp. 1988).

### Age 17

GEORGIA: Ga.Code Ann. §17-9-3 (1982).<sup>5</sup>  
 NEW HAMPSHIRE: N.H.Rev.Stat.Ann. §§21-B:1, 630.1  
 (V) and 630.5 (XIII) (1986 and Supp. 1987) (appear-  
 ing to set both 17 and 18 as minimum ages).<sup>5</sup>  
 TEXAS: Tex.Penal Code Ann. §8.07(d) (Supp. 1988).<sup>5</sup>

## A7

### Age 18

CALIFORNIA: Cal.Penal Code §190.5 (West. 1988).<sup>5</sup>  
 COLORADO: Col.Rev.Stat. §16-11-103(1)(a) (Repl.  
 1986).<sup>5</sup>  
 CONNECTICUT: Conn.Gen.Stat.Ann. §53a-46a(g)(1)  
 (1987).<sup>5</sup>  
 ILLINOIS: 38 Ill.Ann.Stat., par. 9-1(b) (Supp. 1988).<sup>5</sup>  
 MARYLAND: 27 Md.Code §412(f) (Repl. 1988).<sup>5</sup>  
 NEBRASKA: Nebr.Rev.Stat. §28-105.01 (1985).<sup>5</sup>  
 NEW JERSEY: N.J.Stat.Ann. §§2A:4A-22(a) and 2C:11-  
 3(g) (Repl. 1987 and Supp. 1988).<sup>5</sup>  
 NEW MEXICO: N.M.Stat.Ann. §§28-6-1(A) and 31-18-14  
 (A) (Repl. 1987).<sup>5</sup>  
 OHIO: Ohio Rev.Code Ann. §2929.02(A) (1986).<sup>5</sup>  
 OREGON: Ore.Rev.Stat. §§161.620 and 419.476(1)  
 (1987).<sup>5</sup>  
 TENNESSEE: Tenn.Code Ann. §§37-1-102(3) and 37-1-  
 134(a)(1)

1. Specific reference made in juvenile transfer statute to capital offense.

2. Specific reference made in juvenile transfer statute to sentence of death.

3. At least one person under sentence of death between 1981 and 1987 for murder committed at age sixteen or younger.

4. Minimum age for execution raised after person of lesser age sentenced to death.

5. Minimum age for execution stated in death penalty statute.

NOTE: The State of Vermont is not listed because it no longer has a death penalty for homicide. 13 Vt.Stat.Ann. §2303(a) (Cum.Supp. 1988).

## APPENDIX C

STATE LAWS WHICH EXPRESSLY DESIGNATE  
THE DEFENDANT'S AGE AS A MITIGATING  
FACTOR IN CAPITAL CASES

- ALABAMA: Ala.Code. §13A-5-51(7) (Repl. 1982).
- ARIZONA: Ariz.Rev.Stat. Ann. §13-703(G)(5) (Supp. 1987).
- ARKANSAS: Ark.Code Ann. §5-4-605(4) (1987).
- CALIFORNIA: Cal.Penal Code §190.05(h)(9) (West 1988).
- COLORADO: Col.Rev.Stat. §16-11-103(5)(a) (Repl. 1986).
- CONNECTICUT: Conn.Gen.Stat. Ann. §53a-46(a)(g)(1) (1987).
- FLORIDA: Fla.Stat. Ann. §921.141(6)(g) (1985).
- INDIANA: Ind.Code Ann. §35-50-2-9(c)(7) (Cum. Supp. 1988).
- KENTUCKY: Ky.Rev.Stat. Ann. §532.025(2)(b)(8) (Cum.Supp. 1988).
- LOUISIANA: La.Code Crim.Proc., art. 905.5(f) (1984).
- MARYLAND: 27 Md.Code §413(g)(5) (Repl. 1988).
- MISSISSIPPI: Miss.Code Ann. §99-19-101(6)(g) (Cum. Supp. 1987).
- MISSOURI: Mo.Rev.Stat. §565.032.3(7) (1986).
- MONTANA: Mont.Code Ann. §46-18-304(7) (1987).
- NEBRASKA: Nebr.Rev.Stat. §29-2523(2)(d) (1985).
- NEVADA: Nev.Rev.Stat. §200.035.6 (1987).

- NEW HAMPSHIRE: N.H.Rev.Stat. Ann. §630.5(II)(b)(5) (1986).
- NEW JERSEY: N.J.Stat. Ann. §2C:11-3(c)(5)(c) (Supp. 1988).
- NEW MEXICO: N.M.Stat. Ann. §31-20A-6(I) (Repl. 1987).
- NORTH CAROLINA: N.C.Gen.Stat. §15A-2000(f)(7) (Supp. 1987).
- OHIO: Ohio Rev.Code Ann. §2929.04(B)(4) (1986).
- OREGON: Ore.Rev.Stat. §163.150(1)(b)(B) (Supp. 1988).
- PENNSYLVANIA: 42 Pa.Cons.Stat. Ann. §9711(e)(4) (1982).
- SOUTH CAROLINA: S.C.Code Ann. §16-3-20(C)(b)(7, 9) (Supp. 1987).
- TENNESSEE: Tenn.Code Ann. §32-2-203(j)(7) (1982).
- UTAH: Utah Code Ann. §76-3-207(2)(e) (Supp. 1988).
- VIRGINIA: Va.Code Ann. §19.2-264.4(B)(v) (Repl. 1983).
- WASHINGTON: Wash.Rev.Code §10.95.070(7) (Cum. Supp. 1988).
- WYOMING: Wyo.Stat. §6-2-102(j)(vii) (1988).

No. 87-6026

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

HEATH A. WILKINS,

*Petitioner,*

v.

STATE OF MISSOURI,

*Respondent.*

On Writ Of Certiorari To The Supreme Court  
Of Missouri

**REPLY BRIEF OF PETITIONER**

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## REPLY BRIEF OF PETITIONER

## INTRODUCTION

In reviewing the arguments presented in Respondent, State of Missouri's brief, Petitioner was struck most by what was not included. Although Petitioner intends to reply to the arguments raised in Respondent's brief, two facts essential to a resolution of the issue before the Court were not addressed by Respondent and should be noted.

The first is the fact that death is different.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. It is unique, finally in its absolute renunciation of all that is embodied in our concept of humanity.

*Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). The second is the fact that children are different. Children are not not simply "young adults". Children are inherently different "from adults in their capacity as agents, as choosers, as shapers of their own lives" *Thompson v. Oklahoma*, \_\_\_\_ U.S. \_\_\_\_, 108 S.Ct. 2687, 2693 (1988) (plurality opinion).

Petitioner submits that the question before this Court, whether a 16 year old child may be constitutionally subject to the death penalty, cannot be answered without some consideration of those two fundamental facts. To attempt to do so leads to the sort of fallacious reasoning found in Respondent's brief where the "ordeal of judgment", *Trop v. Dulles*, 356 U.S. 86, 104 (1958), is reduced to a simple tallying process.

The underlying question this Court must address is whether Heath Wilkins, or any 16 year old child, is capable of acting with the degree of culpability and moral

blameworthiness necessary to invoke society's response that he has forfeited "his moral entitlement to live." *Spaziano v. Florida*, 468 U.S. 447, 469 (1984) (dissenting opinion of Stevens, J., Brennan, J., and Marshall, J.).

#### THE EXECUTION OF 16 YEAR OLD CHILDREN OFFENDS OUR EVOLVING STANDARDS OF DECENCY

All of the objective indicators of contemporary standards of decency support the conclusion that the execution of someone for a crime he committed at the age of 16 is always cruel and unusual. Respondent implicitly acknowledges this by its failure to provide the Court with any "strong counterevidence . . . that a national consensus against this practice does not exist." *Thompson*, 108 S.Ct. at 2707 (O'Connor, J., concurring). Instead, Respondent attacks the relevance and/or reliability of each objective indicator presented by Petitioner. Respondent argues that all of the indicators of contemporary standards of decency should be ignored by the Court,<sup>1</sup> with the exception of legislative enactments.

Respondent is thus arguing that the Court should abandon its well established Eighth Amendment analysis which requires that the Court's judgment be "informed by objective standards to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality

<sup>1</sup> Jury verdicts, (Resp. Br. 32 "it is difficult to view punishment verdicts as an 'objective' indicator of evolving standards of decency"); Professional Organizations (Resp. Br. 36 "it has nowhere been explained how the view of individual interest groups are reliable 'objective factors'"); Laws of other nations (Resp. Br. 38 "it is truly perilous for this Court to abstract the societal mores of other nations, individually or collectively"); and Treaties (Resp. Br. 41 "these agreements are at least irrelevant and at most evidence that no national consensus exists.")

opinion). The objective evidence presented by Petitioner is necessary for the careful consideration the Court must give to "the reasons why a civilized society may accept or reject the death penalty in certain types of cases." *Thompson*, 108 S.Ct. at 2691 (plurality opinion). The relevance of each has already been recognized by this Court. *Thompson*, 108 S.Ct. 2687.

The actions of prosecutors in not seeking death sentences against 16 year olds and of juries in not sentencing 16 year olds to death are particularly relevant because "a lack of interest on the part of the public in sentencing certain people to death, indicate(s) that contemporary morality is not really ready to permit the regular imposition of the harshest of sanctions in such cases."<sup>2</sup> *Thompson*, 108 S.Ct. at 2692 n.7. (plurality opinion). This reluctance is amply supported by the statistics of how small a percentage of death row inmates committed their crimes at age 16 or younger. Their numbers continue to dwindle. As of August 1, 1988, there were 2,110 people on death row, only 5 (or 2%) of whom are currently under sentence of death for crimes committed at age 16 or younger. NAACP Legal Defense and Education Fund, Inc., Death Row, U.S.A.1 (August 1, 1988).

Even if this Court were to adopt Respondent's argument and look solely to legislative enactments, the conclusion would be the same. Executing people for crimes they committed as children is no longer acceptable.

<sup>2</sup> Respondent's attempt to draw some analogy between the number of women on death row and the number of children on death row is flawed (Resp. Br. 32), see also *Thompson*, 108 S.Ct. at 2718 (Scalia, J., dissenting). Adult women are no longer considered less competent than men whereas children are generally regarded as being less competent than adults.



Respondent places a great deal of weight on the action of legislatures in determining our current standards of decency (Resp. Br. 18). In its analysis Respondent takes exception to the methods employed, and the results reached, by the plurality and concurring opinions in *Thompson*. First, Respondent disputes the relevance of considering states which have no current death penalty statute (Resp. Br. 20). Contrary to Respondent's assertion (*Id.*), this Court has always included in its Eighth Amendment analysis a determination of how many jurisdictions authorize the death penalty for a particular offense or class of offender. See e.g. *Tison v. Arizona*, — U.S. —, 107 S.Ct. 1676, 1685-86 (1987); *Edmund v. Florida*, 458 U.S. 782, 792 (1982) ("only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die"); *Coker v. Georgia*, 433 U.S. at 596 ("Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman."). States which do not authorize the death penalty under any circumstance are, therefore, relevant and necessary to determine how many jurisdictions would permit the execution of 16 year olds.

Next, Respondent argues that the plurality and concurring opinions in *Thompson* were wrong to disregard the 19<sup>3</sup> states which do not expressly set minimum ages at which a child may be executed. (Resp. Br. 23-25). Respondent's thesis is that "this Court's examination of objective indicators for 'evolving standards of decency'

<sup>3</sup> As noted by Respondent, Vermont no longer has a death penalty, 13 Vt. Stat. Ann. Section 2303(a) (Cum. Supp. 1988) and therefore the number of these jurisdictions is now 18 (Resp. Br. 20 n.15).

must rely upon presumptions," (Resp. Br. 21) and that "it is implausible (to say the least) to suggest that a legislature which enacted a law permitting the criminal prosecution of juveniles as adults failed to contemplate that these individuals might thereby receive a sentence of death" (Resp. Br. 22). If Respondent's argument is correct, then this Court must presume that the Florida legislature contemplated and fully intended that six year old children could be executed in their state. Not only does the Florida transfer statute, Fla. Stat. Ann. Section 39.02(5)(c)(1) (Supp. 1988), make the execution of a six year old child theoretically possible, it does so without providing the child with a "rebuttable presumption that he is not mature and responsible enough to be punished as an adult."<sup>4</sup> See *Thompson*, 108 S.Ct. at 2712 (Scalia, J., dissenting). Since every member of the Court, as well as Respondent, agrees that such a situation would be unconstitutional, *Thompson*, 108 S.Ct. at 2695 (plurality opinion); at 2706 (concurring opinion); at 2714, 2718 (dissenting opinion) (Resp. Br. 17), the only supportable presumption is that the Florida legislature did not intend

<sup>4</sup> 1. A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court as set for in Section 39.06(7) unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition for delinquency, if any, **all** be dismissed. The child **shall** be tried and handled in every respect as if he were an adult.

a. On the offense punishable by death or by life imprisonment

\* \* \* \*

If the child is found to have committed the offense punishable by death or by life imprisonment, the child **shall** be sentenced as an adult."

Fla. Stat. Ann. Section 39.02(5)(c) (Supp. 1988). (Emphasis added).

this result. Courts do not presume that legislatures intentionally pass unconstitutional laws.

Justice O'Connor's call for affirmative and unequivocal evidence of a State's desire to execute 16 year olds is reasonable. Missouri's response that this Court should presume such evidence on the basis of juvenile transfer statutes<sup>5</sup> should, once again, be rejected.<sup>6</sup>

**A MINIMUM AGE FOR EXECUTIONS CAN BE SET BY  
THIS COURT IN THE EXERCISE OF ITS JUDGMENT,  
INFORMED AND SUPPORTED BY OBJECTIVE  
EVIDENCE.**

Respondent also argues that although there is some age below which "executing a youthful defendant would always be 'indecent'" (Resp. Br. 17)<sup>7</sup>, this age cannot be located by this Court because to do so would be to draw a "bright line" where none exists. (Id). In *Thompson*, every

<sup>5</sup> Respondent also points to the "statutes which specifically acknowledge the link between the defendant's age and the appropriateness of capital punishment" by including age as a statutory mitigating factor as evidence of legislative intent to permit the execution of children (Resp. Br. 25). The inclusion of age as a mitigating factor however, says nothing about the minimum age at which a child may constitutionally be executed. Age as a mitigating factor "is a constitutional requirement made mandatory by the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). It is not a matter of legislative discretion and so cannot be said to reflect legislative attitudes." C.M. Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in *Eddings v. Oklahoma*, 20 Crim. L. Bull. 5, 13 (1984).

<sup>6</sup> For a discussion of the danger of such presumptions, see E. Lane, Legislative Process and Its Judicial Renderings: A Study in Contrast, 48 U. Pitt. L. Rev. 639, 657 (1987).

<sup>7</sup> Respondent has chosen "some point in the age range between ten and thirteen" (Resp. Br. 17).

member of the Court agreed that because there "is some age below which a juvenile's crimes can never be constitutionally punished by death," it is the Court's duty to locate that age. *Thompson*, 108 S.Ct. 2706 (O'Connor, J., concurring opinion). Therefore, Respondent's position that no "bright line" can be drawn has already been rejected by this Court. The question now becomes where to draw that line.

Overwhelming and undisputed evidence establishes that children are less mature than adults.<sup>8</sup> Additionally, the consensus among experts is that "[m]any of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s." *Amici Curiae* brief of The American Society For Adolescent Psychiatry and the American Orthopsychiatric Association at 4 and citations therein. Therefore, setting seventeen as the age below which a child can never be constitutionally subject to the death penalty would be conservative.<sup>9</sup>

Respondent asserts that before this Court can justify a choice of any age as the constitutional minimum for the death penalty, it must be shown that there is a "uniform chronological age of maturity" (Resp. Br. 44). Obviously, no such showing is possible. Children do not grow at a

<sup>8</sup> For a discussion of the psychological and emotional differences between adolescents and adults, See *Amici Curiae* brief of The American Society for Adolescent Psychiatry and the American Orthopsychiatric Association at 3-8; See also *Amici Curiae* brief of the American Baptist Churches et. al. at 38-50 and *Amici Curiae* brief of The Child Welfare League of America et. al at 14-18.

<sup>9</sup> Petitioner agrees with the position taken by all of the amici that 18 is the more appropriate age below which to prohibit executions. However, Heath Wilkins was 16 years old at the time of the offense, therefore Petitioner limits himself to a discussion of 16 year olds.



uniform rate. While Petitioner agrees that there are children of every age who are mature beyond their years, Petitioner recognizes that these few "exceptionally mature" children are just that, exceptions. Law is not based on exceptions. Contrary to Respondent's assertion (Resp. Br. 44), chronological age is the best predictor of maturity. The basic principle that children, as a class, are less mature than adults, underlies every law which restricts the rights and responsibilities of people on the basis of age. See Appendix H, Petitioner's Brief; see also *Thompson*, 108 S.Ct. at 2701-2706, Appendices A through F. Respondent refuses to acknowledge

the experiences of mankind, as well as the long history of our law, recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

*Thompson*, 108 S.Ct. at 2692 (plurality opinion) quoting *Goss v. Lopez*, 419 U.S. 565, 590-591 (1975) (Powell, J., dissenting).

Respondent counters "the shibboleths offered by petitioner regarding the thought processes of 'juveniles'" by turning to an examination of the facts of Heath's case. (Resp. Br. 45). Based on the testimony Heath gave at his guilty plea hearing (Tr. 126, 128), and in the confession he gave on the day of his arrest (Tr. 219-220), Respondent asserts that Heath's actions were neither impulsive nor emotional. Respondent cites, as fact, Heath's testimony that "he had planned to kill any and all witnesses to his robbery 'a week or two' before he committed that crime" (Resp. Br. 45-46). Based on that "fact", Respondent

argues that Heath engaged in precisely the kind of cost-benefit analysis that the plurality in *Thompson* found "virtually nonexistent" in those under 16 years of age. (Resp. Br. at 46 citing *Thompson*, 108 S.Ct. at 2700). Respondent's argument has three major flaws. First, in his confession, Heath said that he had made up his mind to "kill everyone who had ever made fun of [him]" (Tr. 219). He did not mention any intention to eliminate witnesses. Second, Heath first enunciated the "witness elimination" rationale for his crime after he had decided to seek the death penalty. Third, and most important, the trial judge did not find the "witness elimination" aggravating circumstance argued by the prosecution (Tr. 292-293).<sup>10</sup> Respondent thus chooses "facts" to support its argument which the fact finder never found to exist. Respondent also ignores the overwhelming evidence of Heath Wilkins' impulsivity, emotionalism and psychopathology. (See e.g. Tr. 22-25, 31-32, 234-236, 237, 272-273, 289-298; J.A. 16, 34, 41-43, 49).

---

<sup>10</sup> Respondent asserts that the "witness elimination" aggravating circumstance, Mo. Rev. Stat. Section 565.032.2(12) (Supp. 1984) "was inapplicable to the present case under any construction of the facts" (Resp. Br. 12 n.7). That is not true. The Missouri Supreme Court has broadly construed the language of the "witness elimination" aggravating circumstance to include cases in which robbery victims were killed to prevent them from becoming witnesses in any future judicial proceeding. See e.g. *State v. Foster*, 700 S.W.2d 440, 445 (Mo. banc 1985), *cert. denied*, 476 U.S. 1178 (1986); and *State v. Gilmore*, 661 S.W.2d 519, 522 (Mo. banc. 1983). Had the trial judge believed that Heath had "an express preexisting plan . . . to kill anyone and everyone he found at Linda's Liquors and Deli to eliminate potential witnesses," *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 108 S.Ct. 2896 (1988) (J.A. 93), he had ample precedent for finding the "witness elimination" aggravating circumstance.



**MISSOURI DID NOT ADEQUATELY CONSIDER HEATH'S  
MATURITY OR MORAL BLAMEWORTHINESS BEFORE  
SENTENCING HIM TO DEATH**

Respondent asks the Court to decline to review Petitioner's argument concerning the process which resulted in Heath Wilkins' death sentence.<sup>11</sup> In *Thompson*, every member of the Court agreed that the propriety of the death penalty for juveniles depends on a consideration of the child's maturity and moral responsibility. *Thompson*, 108 S.Ct. at 2698 (plurality opinion); at 2708 (concurring opinion); and at 2712 (dissenting opinion). In its brief, Respondent states that "Heath Wilkins was not selected at random off the street to receive this penalty" but rather was given "individualized consideration as to whether he should be prosecuted as an adult." (Resp. Br. 30). Therefore, asking the Court to review the "individualized consideration" afforded Heath is essential to a determination of the constitutionality of his death sentence.

Petitioner's examination of what actually occurs when the State of Missouri sentences a child<sup>12</sup> to death serves another important and relevant function. It provides a stark example of how casually the State of Missouri takes this Court's repeated admonitions that children are not adults, and that age is critically important in determining criminal liability.

Respondent asks the Court to presume that if left to the states, only the most "exceptionally mature" 16 year olds

<sup>11</sup> Heath is not attacking his certification for trial as an adult. (Resp. Br. 47-48). As Respondent points out, that issue was never raised in state court, *Heath v. Alabama*, 474 U.S. 82, 86-87 (1985).

<sup>12</sup> Heath Wilkins was a child when he committed his crime. Mo. Rev. Stat. Sec. 211.021 (1986). Every 16 year old sentenced to death in this country is, by law, a child. See Appendix A to this brief.

will be sentenced to death (Resp. Br. 42-45). This hypothesis does not withstand scrutiny. Heath's experience illustrates that the State of Missouri is unwilling to give any meaningful "individualized consideration" of maturity and moral blameworthiness to the children it seeks to execute. Heath Wilkins' age was not afforded the sort of careful consideration this Court has indicated is necessary to justify a death sentence. See e.g. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1676, (1986) (concurring opinion of Powell, J., Burger, C.J., and Rehnquist, J.).

Respondent disputes this, calling Petitioner's assertion that Heath's age was irrelevant in the state courts "astoundingly frivolous" (Resp. Br. 48 n. 38). As support, Respondent cites the statute which makes age a mitigating factor, Mo. Rev. Stat. Sec. 565.032.3(7) (1986) and the opinion of the Missouri Supreme Court (*Id.*). Respondent does not explain how its bare recitation that age was considered as a mitigating factor is relevant to a determination that Heath's maturity and moral blameworthiness were carefully considered. As to the Missouri Supreme Court's consideration of these factors, the four sentences devoted to them are as follows:

The trial judge clearly indicates that he considered mitigating factors in addition to defendant's age in the required trial report. Defendant was 16 years and seven months old when he murdered Nancy Allen. He was 17 years and four months old when he pleaded guilty. He had completed nine years of education and had an intelligence quotient of 105.

Wilkins, 736 S.W.2d at 415 (J.A. 89-90). This reality belies Missouri's claim that it seeks the power to execute only the "exceptionally mature" 16-year-old murderer.

Based on all of the objective indicators of our evolving standards of decency, as well as the social scientific evidence concerning the psychological and emotional development of 16 year old children, the only justified response is to remove them from the class of those the state may constitutionally execute.

### CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the Missouri Supreme Court insofar as it affirmed the death sentence in this case, vacate the death sentence and grant such other relief as it deems appropriate.

Respectfully submitted,

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## APPENDIX



# APPENDIX A

## AGE OF MAJORITY

State	Age	Citation
AL	19	Ala. Code Sec. 26-1-1 (1986)
AK	18	Alaska Stat. Sec. 25.20.010 (1983)
AZ	18	Ariz. Rev. Stat. Ann. Sec. 1-215(2) (1987)
AR	18	Ark. Stat. Ann. Sec. 9-25-101(a) (1987)
CA	18	Cal. Civil Code Sec. 25.1 (West 1987)
CO	18	Colo. Rev. Stat. Sec. 13-22-101 (1987)
CT	18	Conn. Gen. Stat. Ann. Sec. 1-1d (1988)
DL	18	Del. Code Ann. tit. 1, Sec. 701 (1985 Repl.)
DC	18	D.C. Code Ann. Sec. 30-401 (1981)
FL	18	Fla. Stat. Ann. Sec. 743.07 (West 1986)
GA	18	Ga. Code Ann. Sec. 74-104(a) (Supp. 1988)
HI	18	Haw. Rev. Stat. Sec. 577-1 (1985 Repl.)
ID	18	Idaho Code Sec. 32-101 (1983)
IL	18	Ill. Ann. Stat. ch. 110 1/2 para. 11-1 (Smith-Hurd Supp. 1988)
IN	18	Ind. Code Ann. Sec. 34-1-67-1(6) (Burns 1986)
IA	18	Iowa Code Ann. Sec. 599.1 (West 1981)
KS	18	Kan. Stat. Ann. Sec. 38-101 (1986)
KY	18	Ky. Rev. Stat. Ann. Sec. 2.015 (Michie/Bobbs-Merrill 1985)
LA	18	La. Civ. Code Ann. art. 29 (West Supp. 1988)
ME	18	Me. Rev. Stat. Ann. tit. 1, Sec. 72 (1979)
MD	18	Md. Ann. Code art. 1, Sec. 24 (1981)
MA	18	Mass. Gen. Laws Ann. ch. 4, Sec. 7 Cl. fifty-first (West 1986)
MI	18	Mich. Stats. Ann. Sec. 25.248(2)(b) (Cum. Supp. 1987)
MN	18	Minn. Stat. Ann. Sec. 645.45 (West Cum. Supp. 1988)
MS	21	Miss. Code Ann. Sec. 1-3-27 (1972)

## AGE OF MAJORITY (Continued)

State	Age	Citation
MO	—	Not Uniform
MT	18	Mont. Code Ann. Sec. 41-1-101 (1987)
NE	19	Neb. Rev. Stat. Sec. 38-101 (1984)
NV	18	Nev. Rev. Stat. Sec. 129.010 (1987)
NH	18	N.H. Rev. Stat. Ann. 21:44 (1987 Cum. Supp)
NJ	18	N.J. Stat. Ann. Sec. 9:17 B-3 (West Supp. 1988)
NM	18	N.M. Stat. Ann. Sec. 28-6-1 (1987) (Repl.)
NY	—	Not Uniform
NC	18	N.C. Gen. Stat. Sec. 48A-2 (1984)
ND	18	N.D. Cent. Code Sec. 14-10-01 (1981)
OH	18	Ohio Rev. Code Ann Sec. 3109-01 (Baldwin 1983)
OK	18	Okla. Stat. Ann. titl. 15, Sec. 13 (West 1983)
OR	18	Or. Rev. Stat. Sec. 109-510 (1987)
PA	21	Pa. Stat. Ann. tit. 1 Sec. 1991 (Purdon 1988)
RI	18	R.I. Gen. Laws Sec. 15-12-1 (1981)
SC	18	S.C. Const. art. XVII, Sec. 14 (as amended 1975)
SD	18	S.D. Codified Laws Ann. Sec. 26-1-1 (1984)
TN	18	Tenn. Code Ann. Sec. 1-3-105(1) (1985)
TX	18	Tex. Fam. Code Ann. Sec. 11.01(1) (Vernon 1986)
UT	18	Utah Code Ann. Sec. 15-2-1 (1986)
VT	18	Vt. Stat. Ann. tit. 1 Sec. 173 (1985)
VA	18	Va. Code Ann. Sec. 1-13.42 (1987)
WA	18	Wash. Rev. Code Ann. Sec. 26.28.010 (1986)
WV	18	W. Va. Code Ann. Sec. 2-2-10(aa) (1987)
WI	18	Wis. Stat. Ann. Sec. 990.01(3) (1986)
WY	19	Wyo. Stat. Sec. 14-1-101 (1986)

MOTION FILED  
AUG 17 1988

Nos. 87-5666 and 87-6026

87-5765  
In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.87-5666

JOSE MARTINEZ HIGH v. ZANT, WARDEN

No.87-6026

HEATH A. WILKINS v. MISSOURI

On Writs of Certiorari to the  
Supreme Court of Georgia and  
Supreme Court of Missouri

MOTION FOR LEAVE  
TO FILE

AMICUS CURIAE BRIEF  
of the  
WEST VIRGINIA COUNCIL OF CHURCHES  
On Behalf of the Petitioners

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504



MOTION FOR LEAVE TO FILE

BRIEF AMICUS CURIAE

Amicus, West Virginia Council of Churches, respectfully requests that this Court grant permission to file the appended Brief, for the following reasons: Counsel for Amicus has not received any responses from letters sent to the attorneys for the Parties a sufficient time ago, except in one instance. Amicus is intensely concerned with the issues involved in these cases, and feels that to put teenagers to death is unconstitutional.

Amicus has reason to believe that general considerations as to the proffered unconstitutionality of capital punishment may not be urged herein (in the Brief of Amicus, this is covered); other esoteric considerations, including the physiological/psychological effects of puberty, and potential discrimination,

Amicus believes, is not briefed in the same way as the appended Brief and, hence, the matters contained in the Brief of the Amicus, it is believed, will be of substantial additional aid to the Court in its deliberations in these cases. This is not meant to deprecate, in any way, the salutary efforts of the Parties herein or of their Counsel.

Respectfully,

Paul R. Stone,

Counsel for Amicus

West Virginia Council  
of Churches

# ENTRY OF APPEARANCE

The undersigned attorney, Paul R. Stone, a member of the Bar of this Court since 1963, and authorized by the West Virginia Council of Churches (headquartered in Charleston, West Virginia) to represent it in the matter of filing the appended Amicus Curiae Brief, hereby apprises the Court of his appearance in this matter.

Date: *Aug. 13* 1988

*Paul R. Stone*  
Paul R. Stone



# CERTIFICATE OF SERVICE

The undersigned, Paul R. Stone, Attorney, hereby certifies that on *Aug. 13*, 1988, he effected service, via First Class U.S. Mail, sufficient postage affixed thereto, of the annexed papers in this case and including the Brief of the Amicus (40 copies thereof being also sent, via similar U.S. mail service, to the U.S. Supreme Court, Washington, D.C., 20543), 3 copies to Parties' Counsel (as follows):

o/b/o No.87-5666, High v. Zant  
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All Parties required to be served have been served.

*Paul R. Stone*  
Paul R. Stone, Counsel for Amicus  
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Supreme Court, U.S.

FILED

SEP 2 1988

PANIEL, JR.  
CLERK

No. 87-6026

No. 87-5666

87-5765

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

vs.

WALTER ZANT, WARDEN,

*Petitioner,*

*Respondent.*

On Writ of Certiorari to the United States Court of  
Appeals for the Eleventh Circuit.

HEATH A. WILKINS,

vs.

STATE OF MISSOURI,

*Petitioner,*

*Respondent.*

On Writ of Certiorari to the Supreme Court of the State  
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September 2, 1988

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BRIEF OF INTERNATIONAL HUMAN  
RIGHTS LAW GROUP

INTEREST OF AMICUS

Amicus Curiae International  
Human Rights Law Group has obtained the  
written consent of the parties to file  
this brief.<sup>1/</sup>

The International Human Rights  
Law Group ("Law Group") is a non-profit  
public interest organization incorporated  
in the District of Columbia. Its goals  
include the development and promotion of  
legal norms of international human rights.  
To that end, the Law Group has represented

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<sup>1/</sup> The parties' letters of consent to the filing  
of this brief are being filed with the Clerk of  
Court pursuant to Rule 36.2 of the Rules of this  
Court.

individuals and organizations, on a pro bono basis, before United States and international tribunals.

With respect to the execution of juvenile offenders in the United States, the Law Group submitted an amicus curiae brief in Thompson v. Oklahoma, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 2687 (1988), in which the Court vacated the death sentence for a crime committed when the defendant was 15. Representatives of the Law Group have testified in opposition to juvenile capital punishment before Congress, and the Law Group co-sponsored a petition challenging the practice before the Inter-American Commission on Human Rights.

In Thompson, this Court found that in some circumstances the execution of juveniles violates the Eighth Amendment to the Constitution. The Law Group



respectfully submits and intends to demonstrate that execution of any person under the age of 18 offends internationally-accepted standards of decency and thereby violates the Eighth Amendment to the Constitution. Such executions also violate treaties signed by the United States and rules of customary international law binding on the United States.

STATEMENT OF THE CASES

Petitioner Jose Martinez High was found guilty of capital murder, armed robbery, kidnapping, aggravated assault and possession of a firearm by a jury in Taliaferro County, Georgia on December 1, 1978. On the same day, he was sentenced to death.

The State's evidence showed that on the night of July 26, 1976, High and

two accomplices robbed a gas station attendant at gunpoint, then kidnapped him along with his eleven-year-old stepson. High and the others drove the victims to a remote place and shot them. The attendant survived; his son died. The case has been reviewed numerous times. The Supreme Court of Georgia and the U.S. Court of Appeals for the Eleventh Circuit have upheld the death sentence.

The acts described above occurred when High was 17 years of age. Under Georgia law, although the age of majority for most purposes is 18, persons are treated as adults at age 17 under the criminal code. Georgia law prohibits executions of persons under the age of 16, and thus, unlike the Thompson case, the state law clearly permits the execution of Jose Martinez High.

Petitioner Heath A. Wilkins pleaded guilty to first degree murder on May 9, 1986, in the Circuit Court of Clay County, Missouri. Wilkins admitted involvement in the murder of a liquor store clerk on July 27, 1985. The court sentenced him to death on June 27, 1986. His case was appealed to the Missouri Supreme Court which upheld the death sentence.

Wilkins committed the murder when he was 16 years and 7 months old. Under the Missouri criminal code, 17 year olds are treated as adults, but people as young as 14 may be certified for trial as adults. Wilkins was so certified. The adult criminal code in Missouri has no minimum age for capital punishment.



SUMMARY OF ARGUMENT

In Thompson v. Oklahoma, a plurality of this Court held that the execution of any person who committed a crime while under the age of 16 violates the Eighth Amendment to the Constitution. Under the same analysis as that employed in Thompson, this Court should find that execution of any person for a crime committed when he was under the age of 18 also violates the Eighth Amendment. Moreover, such executions violate treaty obligations of the United States, as well as its obligations under customary international law.

Part I of this brief discusses the Eighth Amendment's prohibition on cruel and unusual punishment as set forth in Thompson. Although the Justices were divided as to the proper holding in

Thompson, they agreed on the proper approach to analyzing the Eighth Amendment. The Justices agreed that the Court must assess "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

The plurality recognized the level of international consensus as one of the standards to consider in evaluating the constitutionality of a punishment in this country. Similarly, how the United States provides for the human rights of its own citizens is properly the concern of other civilized nations. If the United States fails to recognize those concerns it may find it is violating human rights obligations. At the least, it may find it does not maintain as high a standard of

human rights as those states it most respects.

In widely-adopted treaties and international practice cited by the Thompson plurality, 18 rather than 16 is the age that other nations agree is the acceptable minimum. Similarly, in widely-adopted resolutions of international organizations, persons who commit crimes under the age of 18 are not subject to capital punishment. The United States has participated in the debates regarding adoption of these resolutions and has signed several human rights treaties without objecting to the prohibition on executing persons for crimes committed under age 18.

In Part II of the Brief, Amicus discusses the United States' international legal obligations relevant to capital



punishment for persons who commit crimes while under the age of 18. The International Covenant on Civil and Political Rights and the American Convention on Human Rights forbid, in all circumstances, execution of persons under 18 at the time of their offense. The United States has signed these two treaties. International law requires that a signatory may not undermine the objectives and purposes of a treaty pending its ratification. Execution of petitioners will undermine the objectives and purposes of treaties forbidding such executions. Consequently, the United States may not execute petitioners.

Even if the United States were not a signatory to these Conventions, customary international law would forbid the execution of petitioners. By now,

widespread practice combined with the predominant view that nations are bound to forbid the execution of juvenile offenders has effectively created a rule of customary international law. This international law is part of United States law and is superior to the laws of the several states. Therefore, the United States' treaty obligations and the rules of customary international law prohibit the execution of petitioners High and Wilkins because both were under the age of 18 when they committed their respective crimes.

ARGUMENT

I. Objective Standards of Decency  
Established by the International  
Community Prohibit the Execution  
of Juvenile Offenders.

In Thompson v. Oklahoma, \_\_\_\_\_  
U.S. \_\_\_\_\_, 108 S. Ct. 2687 (1988), the  
plurality held that execution of a person  
for a crime committed when he was under  
the age of 16 violates the Eighth Amend-  
ment's prohibition of cruel and unusual  
punishment. The plurality expressly  
stated that it had not resolved the issue  
whether execution of a person for a crime  
committed below the age of 18 would also  
violate the Constitution. Id. at 2700.  
This question, among others, is now before  
the Court as it considers the instant  
cases. In both cases, the petitioners  
face the death sentence for crimes



committed when they were over the age of 16 but under the age of 18; further, in Georgia, such executions are clearly permitted by that jurisdiction's statutory law.

In Thompson, the eight Justices agreed that the key to Eighth Amendment analysis is to examine "evolving standards of decency" in society. Among the standards relied on by the plurality and by the Court in past cases are those established by the international community. With regard to juvenile execution, the international community has reached a consensus that execution of persons who committed crimes while under the age of 18 offends civilized standards of decency.

A. Eighth Amendment Analysis  
Requires Objective  
Assessment of Social  
Evolution.

In Thompson, all the Justices agreed that Chief Justice Warren's opinion in Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) sets forth the applicable standard for Eighth Amendment analysis:

The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society'.

Thompson at 2691 (Stevens, J., quoting Trop at 101); see also Thompson at 2706 (O'Connor, J., concurring); Thompson at 2714, (Scalia, J., dissenting).

Justice Scalia pointed out that the difficulty of assessing societal standards is that "it is all too easy to believe that evolution has culminated in one's own views." Thompson at 2715 (Scalia, J., dissenting). He advises, therefore, that the Court look to "objective" standards when assessing social evolution: "To avoid this danger [of subjectivity] we have, when making such an assessment in prior cases, looked for objective signs of how today's society views a particular punishment." Thompson at 2715, citing Furman v. Georgia, 408 U.S. 238, 277-79 (1972) (Brennan, J., concurring). Amicus agrees that this approach requires the assessment of objective societal standards, among which are the standards of the international community.



B. International Consensus  
Provides an Objective Sign  
of Social Evolution.

In looking for an objective sign of social evolution, the Thompson plurality examined the practice of American state legislatures and juries regarding the execution of persons below the age of 16. Equally significant, the plurality expressly considered the standards of the international community:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. Thus, the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in

the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Thompson at 2696 (emphasis added). In a footnote the plurality states:

In addition, three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights; Article 4(5) of the American Convention on Human Rights; [and] Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

Thompson at 2696 n.34, (citations omitted; emphasis added). Thus, the Thompson

plurality followed several prior cases where the Court stated that "international opinion" is among the "objective factors" which should inform the Court's analysis of the Eighth Amendment. See Emmund v. Florida, 458 U.S. 782, 788 (1982); Coker v. Georgia, 433 U.S. 584, 592, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102 (1958).<sup>2/</sup>

The collective views of the majority for nations offer objective

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<sup>2/</sup> Despite this past precedent, Justice Scalia argues that international opinion is not relevant to Eighth Amendment analysis. "[R]eliance upon . . . civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this nation." Thompson at 2716 n.4. Justice Scalia offers no rationale for his radical departure from the Court's precedent. Moreover, this rejection of international standards is plainly inconsistent with his own admonition to look to objective standards outside the subjective opinions of the Justices.



criteria for evaluating domestic norms that are based on broader experience and reflection than the perspectives that we associate with juries and state legislatures in our own country. The Court has taken the position that looking to international standards helps alleviate Justice Scalia's expressed concerns relating to objectivity in discovering the standards of "civilized society."

Over the last 40 years, nations have adopted numerous human rights treaties and declarations to establish external standards for all states to observe. It is now accepted that countries should measure the treatment of their own citizens by international

standards.<sup>3/</sup> The Court has had good reason, therefore, for considering international opinion in the past and is similarly justified in looking to the international consensus on the issues presented in this case.

C. International Standards of Decency Prohibit the Execution of Juveniles.

The development of our society with respect to standards of decency parallels the evolution in international society. Slavery and other gross violations of human rights were once tolerated; yet, they are tolerated no longer. International society has reached a consensus

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<sup>3/</sup> See L. Henkin, The Internationalization of Human Rights, Proceedings of the General Education Seminar, Vol. 6, No. 1 (Fall 1977) reprinted in part in Henkin, Pugh, Schachter, & Smit, International Law, at 984-96 (1987).

that no one may be executed for a crime committed when he was under 18. This consensus is reflected in the practice of nations, the signing and ratification of treaties, widely adopted resolutions of international organizations, and in the laws of various nations.

1. Treaties

Treaties are generally the best evidence of an international consensus. States do not simply express their views in treaties, but rather they bind themselves to specific obligations. The vast majority of states have affirmatively bound themselves in various international treaties not to execute persons for crimes committed when they were under the age of 18. As noted, the plurality in Thompson cited three such treaties which demonstrate the international consensus opposed



to juvenile executions. Supra p. 16.  
Justice O'Connor also acknowledged international opposition to juvenile execution. See Thompson at 2707-08 (O'Connor, J., concurring).

Significantly, the treaties cited by the five justices prohibit the execution of persons who committed crimes while they were under the age of 18. The first treaty cited by the plurality is the International Covenant on Civil and Political Rights which states in Article 6(5) that no person may be executed for crimes committed below 18 years of age.<sup>4/</sup> No

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<sup>4/</sup> See supra p. 16. "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." International Covenant on Civil and Political Rights, annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16)

(footnote cont'd)

exceptions are cited. This Covenant has been signed by 58 nations, including the United States -- of the 58 signatories 50 have ratified the Covenant. An additional 36 states have pledged to adhere to the provisions of the Covenant, although these countries are not signatories.<sup>5/</sup>

The travaux préparatoires show that during negotiations no state opposed Article 6(5).<sup>6/</sup> Indeed, the drafters

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(footnote cont'd)

at 53, U.N. Doc. A/6316 (1966) (signed but not ratified by the United States) reprinted in 6 I.L.M. 368, 370 (1967).

<sup>5/</sup> Information on countries who have signed, ratified, or pledged to adhere to the International Covenant on Civil and Political Rights was obtained through a telephone interview from the United Nations Information Centre.

<sup>6/</sup> See J. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. Cin. L. Rev. 655, 671-72 (1983).

considered Article 6(5) to be a codification of existing law.<sup>7/</sup> Similarly, the United States did not object to the article during the negotiation process or set forth any reservations to this provision when it signed the Covenant. The United States supported a U.N. General Assembly Resolution that included Article 6 as a "minimum standard" binding on all Member States whether or not they are parties to the Covenant.<sup>8/</sup>

The second convention cited by the plurality, the American Convention on Human Rights, also forbids capital punishment for crimes committed by anyone under

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<sup>7/</sup> Id.

<sup>8/</sup> Id. at 681 n.94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).



18.<sup>9/</sup> Sixteen States have ratified this treaty. Another three have signed the Convention, including the United States. An additional four states have pledged to follow the Conventions' provisions.<sup>10/</sup> Again, the United States did not object to the inclusion of this prohibition in the Convention.<sup>11/</sup>

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<sup>9/</sup> See supra p. 16. "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." American Convention on Human Rights, No. 22, 1969, art. 4(5), O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, doc. 21, rev. 2 reprinted in 9 I.L.M. 673, 676 (1970).

<sup>10/</sup> Information on countries who have signed, ratified, or pledged to adhere to the American Convention on Human Rights was obtained through a telephone interview from the United States Department of State.

<sup>11/</sup> Observations and Proposed Amendments to the Draft of the Inter-American Convention on the Protection of Human Rights, T. Buergenthal and R.

(footnote cont'd)

Finally, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War specifically forbids the execution of any person for an offense committed while under 18 for any reason.<sup>12/</sup> The United States and 154 other nations are parties to the Geneva Convention on the Protection of Civilian Persons in Time of War.<sup>13/</sup> Although this Convention applies during time of war, a

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(footnote cont'd)

Norris, The Inter-American System, Booklet 13, at 152 (1982).

<sup>12/</sup> See supra p. 16. "[T]he death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 68, para. 4, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 330.

<sup>13/</sup> Information on the number of parties to the Geneva Convention was obtained from the United States Department of State. See note 5, supra.

standard equally solicitous of the sanctity of youthful life should certainly apply in time of peace. The United States signed and ratified this Convention without asserting opposition to the prohibition prohibition of juvenile executions.<sup>14/</sup> Thus, in the earliest stages of the formation of the consensus, the United States failed to mount any

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<sup>14/</sup> The only statement made by the United States regarding Article 68, para. 4 of the final version came during a Committee meeting at the Diplomatic Conferences in Geneva. The United States delegate stated the abolition of the death penalty in the case of protected persons under 18 years of age was a matter which called for very careful consideration before such a sweeping provision was adopted. Comment by Mr. Ginnane, in 19th Mtg, Committee III, May 19, 1949, in Final Report of the Diplomatic Conference of Geneva, Federal Political Department, Berne, n.d. Vol. II, § A, at 673.



opposition to the rule excluding juvenile offenders from punishment by death.<sup>15/</sup>

2. Resolutions of  
International  
Organizations

In addition to the three treaties cited by the plurality in Thompson, there is other evidence of the international consensus forbidding execution of anyone under 18 when a crime was committed. The U.N. Economic and Social Council (ECOSOC) has adopted a resolution providing safeguards relating to the death penalty, one of which prohibits the execution of persons who committed crimes when they were under the age of 18

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<sup>15/</sup> 27th Plenary Mtg, Committee III, Aug. 3, 1949, in Final Report of the Diplomatic Conference of Geneva, Federal Political Department, Berne, n.d., Vol. II, § B, at 431.

years.<sup>16/</sup> The U.N. General Assembly has endorsed these safeguards and asked the Secretary-General "to employ his best endeavors in cases where the safeguards . . . are violated."<sup>17/</sup> In September 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, which endorsed the ECOSOC safeguards and urged all nations retaining the death penalty to implement those safeguards. The United States joined in the consensus on this resolution.<sup>18/</sup>

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<sup>16/</sup> E.S.C. Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984).

<sup>17/</sup> G.A. Resolution 39/118, U.N. Doc. A/39/51, at 211, Oper. paragraphs 2 and 5 (1984).

<sup>18/</sup> Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of

(footnote cont'd)

3. National Laws  
and Practice

In addition to treaties, the plurality in Thompson referred to the law of various nations which still permit capital punishment. For example, according to the Court, Britain and New Zealand permit capital punishment only in limited circumstances, but never in the case of juvenile offenders. Thompson at 2696. Even in the Soviet Union, where capital punishment is available on a wider basis, the execution of juvenile offenders is prohibited. Id.

Even in the United States, laws in various jurisdictions which retain the death penalty nonetheless recognize that

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(footnote cont'd)

Offenders (26 August to 6 September 1985) U.N.  
Doc. A/Conf.121/22 at 86-87 (1985).



special considerations apply to juvenile offenders and at least twenty-one states have set a minimum age for imposition of the death penalty.<sup>19/</sup> The Senate has recently set a minimum age for capital punishment at 18 in a bill authorizing the death penalty for certain drug-related crimes. S. Res. 2455, 100th Cong., 2d Sess., 134 Cong. Rec. S7580, S7580 (June 10, 1988). Opposition to the execution of persons who committed crimes while under the age of eighteen is underscored by the public declarations of various prestigious

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<sup>19/</sup> Nine have set the minimum age at 18 (including the recent addition of New Jersey, Indiana and Maryland). Twelve additional jurisdictions without a minimum age requirement expressly provide for age as one of the mitigating factors in imposing the death sentence. V. Streib, Minimum Statutory Ages for the Death Penalty (October 1, 1985) (unpublished 2memorandum).

United States legal bodies, including the American Law Institute and the American Bar Association. <sup>20/</sup>

In addition to statutory law, Amnesty International has found that the practice of nations is not to impose the death penalty for crimes committed by persons under 18 years of age. Since 1979 over 11,000 legally-sanctioned executions have occurred, but in only 8 cases was the person under 18 at the time of the crime: three were Americans, the other executions occurred in Pakistan (2), Bangladesh,

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<sup>20/</sup> American Law Institute Model Penal Code § 210.6(1)(d) (Proposed Official Draft, 1962); § 210.6, Comment, 1331 Official Draft and Revised Comments (1980); American Bar Association Report No. 117A, approved August 1983.

Rwanda and Barbados.<sup>21/</sup> In a world of more than 165 countries, this statistic alone conclusively indicates an international consensus opposed to the execution of persons for crimes committed while under the age of 18.

Thus, the international community finds that execution of juvenile offenders violates accepted standards of

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<sup>21/</sup> Brief of Amicus Curiae Amnesty International In Support of Petitioner at 6, Thompson v. Oklahoma, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 2687 (1988) (No. 86-6169).

The evidence of an international consensus is necessarily limited because many states prohibit capital punishment altogether as inhumane. The practice of these states should be added to those which prohibit execution of persons under 18. See, e.g., European Convention on Human Rights, Protocol No. 6, April 23, 1983, 1983 Europ. T.S. No. 114 reprinted in 22 I.L.M. 539 (1983). This protocol prohibits capital punishment; it permits no qualifications or exceptions.



decency as shown in international treaties, resolutions of organizations, and the laws and practices of states.<sup>22/</sup>

II. International Law Binding on the United States Prohibits the Execution of Juveniles.

International law prohibits the execution of those convicted of offenses committed prior to the age of 18. Thus, in addition to informing Eighth Amendment jurisprudence, international law, of its own force, prohibits the execution of juvenile offenders. Execution of either petitioner High or Wilkins will expressly

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<sup>22/</sup> See, e.g., Anglo Norwegian Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116 (Judgment of Dec. 18) (for a discussion of customary international law sources); see also U.S. v. LaJeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551); Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987).

violate a rule of United States law and would thereby violate an obligation the United States owes to other nations.

A. International Law is Part of United States Law.

International law is part of the domestic law of the United States. This fact has been reiterated by this Court innumerable times, most notably in the words of Justice Gray in The Paquete Habana:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves

peculiarly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. 677, 700 (1899). Justice Gray's words have recently been restated as the contemporary law of the United States in the Restatement (Third) of American Foreign Relations Law § 111(1) (1987) ("Restatement"):

International law and international agreements of the United States are law of the United States and supreme over the law of the several States [of the Union].

The Restatement explains that treaties are expressly held to be superior to state law by the Constitution, Article VI, § 2, and that customary international law, as part of federal law, is also superior to state law. See id. § 111, Comment d. Therefore, to the extent that either Missouri or Georgia law is contrary



to international law, it also violates the Supremacy Clause of the Constitution.

B. The United States Has Signed and May Not Undermine Treaties Prohibiting Juvenile Capital Punishment.

International law is found primarily in treaties and customary international law. See Statute of the International Court of Justice, art. 38(1); Restatement § 102. Both treaties and customary international law binding on the United States prohibit capital punishment of persons who were under the age of 18 at the time of the offense.

Treaties are often the clearest, most unequivocal source of particular international law rules binding on the United States. That is so in the case at bar. As discussed above, the United States is signatory to two treaties which

expressly obligate the United States not to execute petitioners, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.<sup>23/</sup> The United States has signed, but not ratified, both conventions. Nevertheless, this country is bound by the articles prohibiting juvenile capital punishment in both treaties. Not only has the United States not made a reservation to either article, the United States recognizes the authority of the Vienna Convention on the Law of Treaties<sup>24/</sup> which

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<sup>23/</sup> See supra, Part I.C. 1, pp. 20-26.

<sup>24/</sup> See Letter of Submittal to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971). see also Interpretation of Treaties, 75 Am. J. Int'l. Law 147 (1981); International Law Commission, Report to the General Assembly (1966), 2 Ybk. Int'l. Comm'n 172, 202; McNair, The Law of

(footnote cont'd)

prevents the United States from undermining the object and purpose of a treaty this country has signed, even before ratification. Article 18 of the Vienna Convention provides:

[A] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

a. it has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty.

Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969) reprinted in 8 I.L.M. 679, 686 (1969).

To execute a juvenile offender in violation of either the International

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(footnote cont'd)

Treaties (1961) at 199; Anzilotti, Cours de Droit International (Gidel trans. (1929)) at 372.



Covenant on Civil and Political Rights or the American Convention on Human Rights would plainly defeat the object and purpose of the articles prohibiting juvenile execution. Any sentence of death in violation of either of these Conventions should be stayed until, in the words of the Vienna Convention, the United States has "made its intention clear not to become a party to the treaty." Id. To date, the United States has manifested no such intention.

The Restatement (Third) of the Foreign Relations Law of the United States incorporates Article 18 of the Vienna Convention into § 312(3). As an example of an act that would "defeat the object and purpose" of a treaty, the Restatement discusses a test of a new nuclear weapon in contravention of a provision

prohibiting such tests in a signed, but unratified treaty. The effects of such a test, which would release significant radioactivity into the atmosphere, would be irreversible, since the atmospheric contamination could not be called back. Since the injury is irreversible, the Restatement concludes, such an act would defeat the object and purpose of the treaty in the sense forbidden by the Vienna Convention and customary international law.

Similarly, a life taken by execution is irretrievable. If the United States permits the execution of a juvenile offender, the purpose and object of the signed, but unratified human rights conventions would be defeated in the sense proscribed by the Vienna Convention and the Restatement. Thus, legal obligations

binding on the United States would be breached.

C. Customary International Law  
Binding on the United  
States Also Prohibits  
Juvenile Executions.

Even if the United States withdrew its signature from the International Covenant on Civil and Political Rights and the American Convention on Human Rights, it would still be bound by customary international law which now prohibits capital punishment of persons for crimes committed when they were under age 18. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2).



As discussed above,<sup>25/</sup> treaties, resolutions of international organizations, and the laws of nations clearly show that international law now prohibits capital punishment of persons who commit crimes while under the age of 18. Thus, widely ratified human rights treaties, resolutions of international organizations, and the practice of nations provide compelling evidence that the imposition of the death penalty upon juvenile offenders rises to the level of a customary rule of international law.

#### CONCLUSION

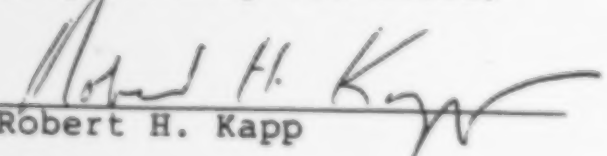
Based on the foregoing, this Court should invalidate the death penalty statutes of Georgia and Missouri which

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<sup>25/</sup> See supra Part I.C., pp. 19-33.

permit the execution of persons for crimes  
committed prior to age 18 as violations of  
international law and the Eighth Amendment  
to the Constitution.

Respectfully submitted,

  
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

*Petitioner,*

vs.

WALTER ZANT, Warden,

*Respondent.*

HEATH A. WILKINS,

*Petitioner,*

vs.

STATE OF MISSOURI,

*Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND  
THE SUPREME COURT OF THE STATE OF MISSOURI

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No. 87-5666

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1988  
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JOSE MARTINEZ HIGH,

Petitioner,

v.

WALTER ZANT, WARDEN,

Respondent.

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On Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit  
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No. 87-6026

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1988  
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HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

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On Writ of Certiorari to the  
Supreme Court of the State of Missouri  
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BRIEF FOR AMICUS CURIAE

DEFENSE FOR CHILDREN INTERNATIONAL-USA

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## INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Defense for Children International-USA (DCI-USA), with and on behalf of Defence for Children International (DCI), whose mandate is to ensure the worldwide promotion and protection of the internationally recognized principles of the United Nations Declaration of the Rights of the Child. DCI is a non-governmental organization (NGO) founded in Geneva, Switzerland in 1979 as one of the initiatives of the International Year of the Child, with individual members, affiliates and supporters in more than 57 countries, and national sections in 17 countries. DCI-USA is the United States section of the movement with local chapters in New York City, New York, New England, Pennsylvania, North Carolina and Florida. It has individual members, supporters and affiliates in more than 30 states.

DCI is in consultative status with the United Nations Economic and Social Council and with UNICEF; has served as the elected Secretariat of the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child since 1983; works closely with the United Nations Commission on Human Rights Open Ended Working Group on the Convention; and acts as the convenor of the NGO working party to draft the United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty.

DCI-USA is a member of the National Coalition Against the Death Penalty and of the United Nations NGO Committee on Human Rights; and acts as consultant to UNICEF on the International Rights of the Child.

## ARGUMENT

### I

NOT ONLY CONTEMPORARY STANDARDS IN THE UNITED STATES AS A WHOLE, BUT ALSO INTERNATIONAL NORMS AND PRACTICES OF OTHER NATIONS, SUPPORT THE CONCLUSION THAT IMPOSITION OF THE DEATH PENALTY FOR CRIMES COMMITTED BY JUVENILES CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THIS NATION'S CONSTITUTION.

In drawing the line at the age of sixteen with regard to the question of the constitutional permissibility of juvenile executions, the plurality of the Court in Thompson v. Oklahoma [hereinafter "Thompson"] expressly recognized (56 U.S.L.W. at 4896)<sup>1</sup>

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<sup>1</sup> It is indeed disheartening that the dissent in Thompson (56 U.S.L.W. at 4907 n.4) so offhandedly dismissed the relevance of international norms even in the limited context of interpreting the Eighth Amendment. Was it really meant to suggest that this Court can altogether dismiss the very existence of international human rights law, when the United States itself, and all official international bodies, including the International Court of Justice, have long proclaimed its ascendancy? To take the example used by the dissent to its untenable ultimate conclusion, it would not be of constitutional relevance even if the United States were at some point in time to be the only nation in the world imposing the death



that, in assessing the Eighth Amendment's proscription of cruel and unusual punishment, this Court must look not only to prevailing

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penalty, or for that matter, the only nation in the globe inflicting such a penalty on juveniles. As shown below in this brief, the execution of juveniles involves international norms of legal, even jus cogens, stature, which are binding on the United States under both international treaty law and international customary law, let alone being relevant in assessing the reach of the Eighth Amendment. Suffice it to state here that, as more fully discussed below, the United States has ratified and voted for, respectively, two global international treaties which outlaw juvenile executions. One has been ratified by virtually all nations, and the other was adopted unanimously by the United Nations and has so far been ratified by 87 countries. Not only did the United States vote for this covenant at the time of its adoption but it subsequently supported a resolution of the U.N. General Assembly proclaiming the binding force on all U.N. members of the covenant's prohibition against juvenile executions. Moreover, the United States is legally bound by the Charter of the United Nations, the constitution of the international community, to promote human rights in cooperation with that world body. By reneging on a legal norm of the United Nations, the United States violates international constitutional law binding on it.

The thesis posed by the dissent in Thompson can be carried to dangerous extremes. It can be used, one dare say, to support any sort of unconscionable state conduct so long as it is

standards, practices and attitudes within the United States, but also to those obtaining in the international community. This is the clear mandate flowing from, e.g., Weems v. U.S., 217 U.S. 349, 378 (1910); Trop v. Dulles, 356 U.S. 86, 101 (1958); Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977); Enmund v. Florida, 458 U.S. 782, 796, n. 22 (1982).

DCI shares the view supported by the plurality in Thompson that, through the laws of most states of the Union<sup>2</sup> declarations of

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supported by majorities whose blind passions and prejudices of the day might be kindled and exploited by official demagoguery. It is common knowledge that the United States itself and the international community as a whole, in the Nuremberg principles, have long rejected such an approach.

<sup>2</sup> Fourteen states plus the District of Columbia have no valid capital punishment statutes. Of the rest, twelve states directly establish the age of eighteen as the minimum age for execution (thus a majority of twenty-seven jurisdictions does not allow the execution of juveniles below eighteen); three set the age at seventeen; three have it at sixteen. Thompson, 56 U.S.L.W. at 4895, 4902.

authoritative bodies,<sup>3</sup> and the extreme paucity of actual executions of juveniles throughout its history<sup>4</sup> the American society as a whole has amply demonstrated its aversion to the phenomenon, leading to the conclusion that it deems it cruel and unusual punishment and thus spelling its constitutional doom under the rationale of the above cited cases.

In particular (conceding arguendo that the death penalty itself is constitutionally permissible, to begin with), the age limit of eighteen marks the ultimate threshold that must be crossed if imposition of capital punishment on a young person is to pass

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<sup>3</sup>Thompson, 56 U.S.L.W. at 4896. See also National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code 3603 (1971); National Council of Juvenile and Family Court Judges, Resolution 2 (July 14, 1988).

<sup>4</sup>Thompson, 56 U.S.L.W. at 4897. See also W. Bowers, Legal Homicide 54(1984); V. Streib, Death Penalty for Juveniles 191-208 (1987); NAACP Legal Defense Fund, Death Row, U.S.A. 1 (May 1, 1988).

constitutional muster, even if one only takes into account the American experience. Not only is that age limit prevalent in the relevant statutes of the individual states (see supra note 2), but persons under eighteen actually executed in the United States account for only about 2% of all executions in the history of the nation (see supra note 4). Of these, the six executed from 1960 to now all were seventeen at the time of commission of their respective crimes,<sup>5</sup> which comes so close to the eighteen age limit (seventeen is the age limit, furthermore, prescribed by only three United States jurisdictions<sup>6</sup>) as to warrant the assimilation of the two.

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<sup>5</sup>V. Streib, Testimony on the Death Penalty for Juveniles (offered to the Subcommittee on Criminal Justice regarding House Bill 343, 99th Cong., June 5, 1986) (mimeo). See also V. Streib, Persons Executed for Crimes Committed While Under Age Eighteen (July 15, 1986) (unpublished memorandum).

<sup>6</sup>See supra note 2.



Eighteen, moreover, is the age at which laws in the United States recognize or accord certain faculties, prerogatives and rights to young persons. The age of civil majority in all jurisdictions of the Union stands at eighteen or over.<sup>7</sup> At that age persons have the right to vote in federal elections (prior to 1971, before eighteen-year olds were granted the right to vote, the age of majority in most states was in fact twenty-one); enlist in the armed forces, that is risk death in defense of their country, without parental consent (they can enlist with parental consent at seventeen); and marry without parental consent, according to the laws of most of the states.<sup>8</sup> Most states also show solicitude for the young by requiring them to be either

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<sup>7</sup>Petitioner's Brief, Appendix A; M. Soler, et al., Legal Rights of Children in the United States of America, in 2 Law and the Status of the Child 683 (A. Mamalakis Pappas ed. 1983) [hereinafter "Soler"]

<sup>8</sup>Soler, supra note 7, at 683-684.

eighteen or twenty-one before they can consume alcoholic beverages.<sup>9</sup> And, of course, the laws protect persons below the age of civil majority by not giving them the unfettered right to enter into contracts (if they do, their contracts are voidable at their option).<sup>10</sup>

These examples make a compelling case for outlawing executions of those who have not attained at least the age of eighteen at the time of the punishable offense. They, indeed, stand in sharp contrast to the specter on the other hand of state-sanctioned killing of the very same young persons, in the very same country, for crimes committed before they have attained the level of maturity and capacity for independent and reasoned action that the civil law uniformly demands. Any semblance of

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<sup>9</sup>Id. at 684-685.

<sup>10</sup>Id. at 713. The age of majority is eighteen or over according to the laws of all states. See supra text accompanying note 7.



rationality in penal statutes, such as the ones now in question before this Court, is eclipsed in the context of the broader American landscape; and their arbitrariness, inequity and ultimate cruelty and inhumanity offend the conscience. Devoid of rationality, such laws, dealing as they do with a final and irrevocable outcome, with the deliberate unalterable destruction of human beings, and, as the plurality in Thompson recognized (56 U.S.L.W. at 4898), serving no legitimate goals of punishment or other substantial interest of the State, must not be sanctioned by this Court.

A rational uniform minimum standard<sup>11</sup> is needed in this nation to govern this most

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<sup>11</sup>The dissenting opinion in Thompson (56 U.S.L.W. at 4908), recognizes that "at some age a line does exist"; and even concedes that there is a general "reduction in willingness to impose capital punishment" (*id.* at 4907). That line should be drawn at eighteen, being as it is there where the overwhelming majority of all indicators converge.

fundamental issue of human rights and human dignity across the entire land. (And eighteen is the minimum age limit for which a legal foundation can be laid just from legal building blocks found within these shores, as posited above.) The grave issue of life or death should not be left to the vagaries of the uninformed opinions, local prejudices and parochial passions of the day, and to fortuitous circumstances of time and place, particularly where it concerns the young who are supposed to be the wards of society. (This issue patently is not on an equal footing with most of the matters left to the states for regulation in our federal system.) Allowing the status quo to continue would let stand the incoherent, checkered legal tableau which the Inter-American Commission of Human Rights only recently, in the case of James Terry Roach and Jay Pinkerton [hereinafter "Roach"], held "results in the arbitrary deprivation of life and inequality before the

law" and contravenes the American Declaration of the Rights and Duties of Man.<sup>12</sup>

The case for fixing on age eighteen as the threshold limit, however, becomes even more compelling and overwhelming when one factors into the Eighth Amendment analysis (as one must, as noted above) the inter-State comparative and international perspectives.

The abundant evidence of national practices across the globe and norms of international law opposed to the execution of juveniles, laid out in the companion briefs and under Point II below, need not be reiterated here. Such evidence must at least be used to inform this Court's interpretation of the Eighth Amendment. And, for purposes of this concrete task of construction alone, the Court need not necessarily reach the conclusion that the norms in question are

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<sup>12</sup>Resolution No. 3/87, Case 9647 (United States), OEA/Ser. L/V/II.69, Doc.17, p. 39, para. 61 and p. 40 (27 March 1987).

sufficiently crystallized or legally binding on the United States (though on the basis of a fortiori reasoning the weight to be given such evidence, even just in the context of Eighth Amendment analysis, increases in proportion to its quantitative and qualitative strength, culminating in its having a conclusive bearing if it shows the existence of settled norms of international law).

DCI, however, firmly endorses the view that this Court confronts and need pass upon a second contention that it poses in tandem with other amici: that execution of youths below the age of eighteen at the time of commission of the crime is unquestionably prohibited by international law, law to which the United States is clearly subject and which this Court is competent and duty-bound to uphold and apply.

INTERNATIONAL LAW, INCLUDING CONVENTIONAL (TREATY) AND CUSTOMARY GLOBAL LAW, BINDING ON THE UNITED STATES PROSCRIBES IMPOSITION OF THE DEATH PENALTY ON PERSONS YOUNGER THAN EIGHTEEN AT THE TIME OF COMMISSION OF THE OFFENSE, AND THIS COURT IS DUTY-BOUND UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION TO INVALIDATE CONTRAVENING LAWS AND PRACTICES OF THE STATES OF THE UNION.

In support of this contention, DCI will avoid burdening the Court with unnecessary repetition of matter contained in companion briefs, with all of which it concurs. Instead emphasis will be placed on supplementary arguments, which should help give an exposition of the fuller dimension of this aspect.

A. The Source and Nature of International Law

Article 38(1) of the Statute of the International Court of Justice sets forth the subject-matter jurisdiction of the Court and, in effect, defines the substantive content of international law. It lists, inter alia, treaties, international custom and general

principles of law recognized by civilized nations.<sup>13</sup> As regards treaties, of course, the Statute embodies the old rule of pacta sunt servanda, which proclaims the binding

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<sup>13</sup>It reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.



force of treaty stipulations vis-a-vis States parties.<sup>14</sup>

The other sources of transnational law, however, are not as clear-cut. The Inter-American Commission on Human Rights in Roach (see supra note 12) listed the following elements of customary norms of international law: "(a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b) a continuation or repetition of the practice over a considerable period of time; (c) a conviction that the practice is required by or consistent with prevailing international law; and (d) general acquiescence in the practice by other states."<sup>15</sup>

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<sup>14</sup>This rule was codified in Article 26 of the Vienna Convention on the Law of Treaties, U.N. Doc A/CONF. 39/27 (1969), reprinted in 8 I.L.M. 679 (1969) [hereinafter "Vienna Convention"].

<sup>15</sup>Supra note 12, at 31, citing II

As this definition indicates, it has never been the view that anything approaching unanimity or even majority participation in the relevant practice of States is necessary. The quantum of practice needed would logically vary inversely according to the quantitative and qualitative weight contributed by the other constitutive elements of the custom referable to any particular norm.

The subjective element mentioned in the quoted definition, known as opinio juris, appears to be losing ground as a strict requirement when it comes to practice that patently has substantial legal content. As early as 1969, Judge Lachs of the International Court of Justice stated, in the North Sea Continental Shelf Cases, that the "general practice of States should be

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International Law Commission Y.B., 1950, p. 26, para. 11.

recognized as prima faciae evidence that it is accepted as law."<sup>16</sup>

Dissenting States cannot defeat a customary rule of international law if, in spite of their dissent, a sufficient degree of generality of practice is achieved (acquiescence by some "other States" not by all other States, or the other States, is necessary). Whether a dissenting State itself can be held bound by the rule hinges on its being able to "show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence."<sup>17</sup>

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<sup>16</sup>Quoted in Henkin, Pugh, Schachter and Smit, *International Law, Cases and Materials* 65 (2d ed. 1980) [hereinafter "Henkin"].

<sup>17</sup>M. Akehurst, *A Modern Introduction to International Law* 32 (4th ed. 1982). The author points to the adverb "always" used by the International Court of Justice in the Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116, 131. Another authority on the subject has posited that the International Court of Justice "has never yet treated [litigants'] acceptance of the practice [in question] as a sine qua non of applying the custom to them."

In addition to custom, international law, according to the International Court's Statute, encompasses general principles of law recognized by civilized nations. "Civilized" in this context naturally refers to those well governed nations extending progressive, enlightened and humane treatment to their citizens and others.

In his dissenting opinion in the South West Africa Cases, Judge Tanaka of the International Court discussed the implications of this provision of the Court's Statute vis-a-vis human rights and observed that such rights "are not the product of a particular juridical system...but the same

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Waldock, General Course on Public International Law, 2 Recueil des Cours 1, 50 (1962), reprinted in Henkin, supra note 16, at 67. In the North Sea Continental Shelf Cases, the International Court of Justice stated in dictum that "general or customary law rules and obligations..., by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favor." 1969 I.C.J. 38-39.

human rights must be...protected everywhere man goes....Only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and coordination." Application of Article 38(1)(c), therefore, is not limited "to a strict analogical extension of certain principles of municipal law." Taking the view that human rights are grounded in natural law and are part of the jus cogens, he concluded that, by the very nature of human rights, and by the very nature and purpose of Article 38(1)(c), consent of the States is not required as a condition precedent to the formation of an international rule through the operation of this provision of the Statute. Further he opined that recognition by all the civilized States is not required, nor that the recognition take the form of an official act.<sup>18</sup>

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<sup>18</sup>1966 I.C.J. 296-300. See also the separate opinion of Judge Ammoun in Barcelona

In the case of fundamental human rights, therefore, the normative process has an additional dimension. Such rights are rooted in the "conscience and reason of mankind through the ages,"<sup>18</sup> and are sui generis when compared with the traditional transnational norms of old. They, therefore, warrant special jurisprudential accommodation. For one, human rights precepts are more readily amenable to classification, at one and the same time, as rules evolving through the practice of States on the global plane (international customary norms) and also as "general principles of law recognized by civilized nations." When this duality is there, it logically follows that less weight need be placed on the scale when weighing normative content pursuant to just one of the

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Traction, infra note 20 at 302-06.

<sup>19</sup>See dissenting opinion of Judge Tanaka in the South West Africa Cases, supra note 18.



two formulas inherent in those two categories of substantive international law.

Secondly, there is a certain logical inconsistency in an insistence on strict positivist requirements of State auto-limitation with regard to the formation of basic international human rights law. The International Court of Justice has noted that obligations of States "concerning the basic rights of the human person" are obligations "towards the international community as a whole....By their very nature...[they] are the concern of all states...they are obligations erga omnes." <sup>20</sup> It has also stated in regard to the Genocide Convention that "in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest.... Consequently, one cannot speak

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<sup>20</sup>Barcelona Traction Light and Power Co., Ltd., 1970 I.C.J. 1, 32.

of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties." <sup>21</sup>

From the point of view of international law, a State indeed acts in the international arena primarily as a custodian of its national interests, and those interests may not necessarily coincide, or be compatible with, the interests of other States. In the case of fundamental human rights, however, international law is not confronted with conflicting interests of particular groups, but with the common interests of all human beings. Therefore, conceptions about

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<sup>21</sup>Reservations to the Convention on Genocide, 1951 I.C.J. 15, 23; See also Inter-American Court of Human Rights, Advisory Opinion OC-2/82, September 24, 1982, para. 29; European Commission on Human Rights, Application No. 788/60, 4 European Y.B. of Human Rights, 116, 140 (1961).

Divergence of views regarding the best mode of observance of some human rights is to be differentiated from dissonance as to the

reciprocal exchange of commitments among States and notions that the inter-state bargain that underlies an international norm falls, if not faithfully lived up to by the parties in intrastate practice, are not quite relevant, or as relevant, to the formation of international law relating to the elemental rights of the human person.<sup>22</sup> And when it comes to assessing practice and opinio juris of particular States in this domain, their behavior and pronouncements need be held up to exacting standards of good faith and

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core content of such rights when it comes to the question of a consensual balance.

<sup>22</sup>See Schachter, Crisis of Legitimation in the United Nations, 50 Nordisk Tidsskrift For International Ret 3, 33 (1982) and Henkin, Introduction, in The International Bill of Rights: The International Covenant on Civil and Political Rights 1,8 (L. Henkin, ed. (1984) [hereinafter "Henkin, ed."]), where the authors voice a view in a similar vein. See also Filartiga v. Pena-Irala, 630 F. 2 876, 884 n. 15 (2d Cir. 1980), where the Court stated that widespread contravention of the international customary norm prohibiting torture did not negate its legal force.

subjected to rules of strict accountability.<sup>23</sup>

Underlying these propositions is the fact that the jurisprudential underpinnings of human rights are central to the raison d'être of law itself. And human thought, legal theory, and philosophy as of the beginnings of civilization are permeated with the concept of the inherent and inalienable rights of man--from the Hellenic Stoics and Roman philosophers to St. Thomas Aquinas, Grotius (the father of international law), Locke, Paine, Milton and Blackstone, among others, as well as the American Declaration of Independence and the French Declaration of

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<sup>23</sup>See Nuclear Test Cases, 1974 I.C.J. 457, where the International Court of Justice held France to its word (unilateral-at-large statements of intention to cease nuclear testing in the Pacific). See also Franck, Word Made Law: The Decision of the ICJ in the Nuclear Test Cases, 69 Am. J. Int'l L. 612, 619 (1975).

the Rights of Man and Citizen.<sup>24</sup> (This concept has found recognition in the United Nations Charter and Universal Declaration of Human Rights,<sup>25</sup> which take for granted the pre-existence of universal human rights.<sup>26</sup>) It is these jurisprudential credentials (tradition; pre-eminence; fundamental,

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<sup>24</sup>See generally H. Lauterpach, An International Bill of the Rights of Man 18-64 (1945); F. Castberg, Natural Law and Human Rights: An Idea-Historical Survey, in International Protection of Human Rights: Proceedings of the 7th Nobel Symposium 13-29 (Eide and Schou eds. 1967).

<sup>25</sup>G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (December 10, 1948) Preamble and Art. 1 [hereinafter "Universal Declaration"].

<sup>26</sup>See supra text accompanying note 18 for Judge Tanaka's view that human rights are based on natural law. In the same opinion Judge Tanaka pointed out that "the Charter presupposes the existence of human rights and freedoms which shall be respected; the existence of such rights and freedoms is unthinkable without corresponding obligations...and a legal norm underlying them. Furthermore, there is no doubt that these obligations...also have a legal character by the very nature of the subject matter." 1966 I.C.J. 289-290. See U.N. Charter, Arts. 1(3), 55(c).

ontological and transcendent nature on all levels and planes of human society and governance; and versatility when it comes to the subject-matter jurisdiction of the International court) that ensure to human rights speedier and smoother passage across the international juridical threshold.

Furthermore, there is strong evidence that at least the more fundamental human rights are to be considered norms of jus cogens. The concept of jus cogens has been codified in the Vienna Convention.<sup>27</sup> It is apparent from the wording of the Article (supra note 27) that acceptance by all States

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<sup>27</sup>See Vienna Convention, supra note 14, Article 53, which reads: "A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."



is not necessary to the establishment of a norm of jus cogens. As the text clearly shows, jus cogens norms are absolute, imperative norms that cannot be derogated from by any member of the international community. This is true even of States which might have consistently opposed them.<sup>28</sup>

The Commentary of the International Law Commission to the draft articles of the Vienna Convention states that, before it was decided not to include in this article examples of some of "the most obvious and best settled rules of jus cogens," human rights norms were among the examples contemplated for listing.<sup>29</sup> In the South West African Cases,

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<sup>28</sup>This was acknowledged recently by the Inter-American Commission on Human Rights in Roach, supra note 12, at 33. The Commission, moreover, found that in "the OAS there is recognized a norm of jus cogens which prohibits the State execution of children." Id. at 36.

<sup>29</sup>Documents of the Conference on the Law of Treaties 1968-1969, U.N. Doc. A/CONF. 39/1/Add.2, at 7 and 68 (emphasis added).

Judge Tanaka of the International Court expressed the view that human rights are part of the jus cogens (see supra text accompanying note 18); and the same Court, in Barcelona Traction, referred to obligations of States "concerning the basic rights of the human person" as "obligations erga omnes (see supra text accompany note 20). The Inter-American Commission on Human Rights in Roach posed, but did not address, the question of whether this language "is intended to mean that all codified human rights provisions contained in international treaties are embraced by the concept of jus cogens" (supra note 12, at 35-36). Certainly, however, the right to life qualifies as a "basic right of the human person," even had it not been repeatedly affirmed in international instruments.

B. Supremacy of International Law over Laws and Practices of the Individual States of the Union

The international agreements which forbid the execution of juveniles are clearly self-executing in view of the immediacy and the imperative tone reflected in their respective texts (and even in case of some doubt, the settled rule is that a treaty is presumed to be self-executing).<sup>30</sup> Courts in the United States are bound to apply stipulations in self-executing treaties, as well as norms of customary international law,<sup>31</sup> and to invalidate contravening laws or actions of state or local governments under the Supremacy Clause, Article VI, Clause 2, of the United States Constitution.<sup>32</sup> Ware v.

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<sup>30</sup>See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 131 (T.D. No. 6, Vol. 2, April 12, 1985).

<sup>31</sup>Id.

<sup>32</sup>See also U.S. Constitution, Art. I, Sec. 8, Clause 10, which reflects recognition of federal supremacy over issues involving the "Law of Nations."

Hylton, 3 Dall. 199, 236-237 (U.S. 1796); Baker v. Carr, 369 U.S. 186, 212 (1962); The Paquete Habana, 175 U.S. 677 (1900).<sup>33</sup> This brief will next list the treaty and customary international law norms that are binding on the United States and which forbid the execution of youth below the age of eighteen at the time of the offense for which death is sought to be imposed.<sup>34</sup>

C. Treaty Stipulations, and Other Provisions Qualifying as Conventional Rules, Binding on the United States, by Reason of Which Execution for Crimes of Juveniles Under Eighteen is Prohibited.

The arguments under this rubric are to be distinguished from the argument that the

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<sup>33</sup>See also Oyama v. California, 332 U.S. 633, 649-650 (1948); First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 622-623 (1923); Filartiga v. Pena-Irala, 630 F.2d 876, 880-890 (2d Cir. 1980); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385-1390 (10th Cir. 1981).

<sup>34</sup>"For purposes...of liability to capital punishment, the age of the offender is universally determined as that of the date of the commission of the crime, not of the date

United States is bound under customary international law, as codified in Article 18 of the Vienna Convention (see supra note 14), to refrain from acts which would defeat the object and purpose of treaties prohibiting the execution of juveniles that it has signed but not yet ratified. This valid argument has received full treatment in the companion briefs and need not be reiterated.

Instead, emphasis will be placed on provisions fully binding on the United States as conventional rules (not just on an interim basis or as a stopgap measure, albeit of indefinite duration). The most obvious examples of these by now are the Charter of the Organization of American States<sup>35</sup> as amended by the 1967 Protocol of Buenos

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of the trial or punishment." U.N. Department of Economic and Social Affairs, Capital Punishment: Developments 1961-1965, U.N. Doc. ST/SOA/SD/10, at p. 14, para. 45 (1967).

<sup>35</sup>2 U.S.T. 2394, T.I.A.S. No. 2361 (entered into force December 13, 1951).

Aires,<sup>36</sup> on the basis of which, through subsequent acceptance (as affirmed in Roach, supra note 12, at 30), the American Declaration of the Rights and Duties of Man<sup>37</sup> became binding; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Article 68).<sup>38</sup>

The American Declaration of the Rights and Duties of Man provides in relevant parts that "[e]very human being has the right to life, liberty and the security of his person" (Article I); that all have the right to equality before the law (Article II); that "all children have the right to special protection, care and aid" (Article VII); and

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<sup>36</sup>T.I.A.S. No. 6847, O.A.S.T.S. No. 1-A, O.A.S.O.R., O.E.A./Ser. A/2, Add. 2 (entered into force February 27, 1970).

<sup>37</sup>O.A.S. Res. XXX, 1948, O.A.S.O.R. O.E.A./Ser. L/V/1.4, Rev. (1965).

<sup>38</sup>6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.



proscribes "cruel, infamous or unusual punishment" (Article XXVI). In Roach (supra note 12, at 40), the Inter-American Commission on Human Rights found that the execution of the juveniles Roach and Pinkerton for crimes committed while under the age of eighteen violated Articles I (right to life) and II (right to equality before the law) of the American Declaration. The Commission held that in "the OAS there is a...norm of jus cogens which prohibits the State execution of children" (supra note 12, at 36).

As for the Geneva Convention, which explicitly prohibits execution of juveniles under the age of eighteen at the time of the offense (supra note 38, Article 68), and which is ratified by 165 States, including the United States, it cannot be denied that it establishes a treaty rule binding a fortiori in peace time as well, in view of the fact that it is indeed during times of war or

national emergency only when treaties and general international law allow derogation, if at all (the prohibition against execution of juveniles is non-derogable), from human rights norms.

Over and above these instruments, however, the United States is bound by the Charter of the United Nations, which proclaims "the dignity and worth of the human person" (Preamble); establishes the "promot[ion]" of "universal respect for, and observance of, human rights" as one of its purposes (Articles 1, 55(c); and "pledge[s]" all Member States "to take joint and separate action in cooperation with the organization for the achievement" of this and its other purposes (Articles 55(c), 56). It is now settled that, by virtue of these provisions, the Charter imposes legal obligations on Member States to severally and jointly

respect and promote human rights.<sup>39</sup> Surely, promotion of human rights means pushing forward and expanding the protection of the human person, not going back or reneging on norms already established. The United States, therefore, will not be faithful to its legal pledge to promote human rights<sup>40</sup> if a repudiation of its commitment under the Geneva Convention of 1949, through acquiescence to the enforcement of statutes

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<sup>39</sup>See Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57; Montreal Statement of the Assembly for Human Rights of March 27, 1968, reprinted in 9(1) J. Int'l. Comm'n of Jurists 94; Schwelb, The International Court of Justice and the Human Rights Clauses of the Charter, 66 Am. J. Int'l L. 337, 341-350 (1972); Sohn, The Human Rights Law of the Charter, 12 Tex. Int'l L.J. 129, 131 (1977).

<sup>40</sup>See generally, Schachter, The Charter and the Constitution: The Human Rights Provisions in American Law, 4 Vand. L. Rev. 643 (1951).

such as the one now before this Court, is allowed to stand.<sup>41</sup>

It is in pursuance of the Charter's mandate on human rights, moreover, that the United Nations has elaborated the many human rights instruments currently in existence.<sup>42</sup> Foremost is the Universal Declaration of Human Rights (supra note 25) (that the United States took the lead in elaborating, voted for, and has invoked against other nations), which is now looked upon as the ius constituendum of the Charter<sup>43</sup> with regard to

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<sup>41</sup>As the Inter-American Commission on Human Rights has observed, "human rights...always represent progress with respect to the preservation of human dignity and never a regression to situations that were regarded as having been overcome." IACHR, Annual Report, 1982-1983, OEA/Ser. L/V/II/61 Doc. 22, Rev. 1, at 159 (1983).

<sup>42</sup>See UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev. 1 (1978). Their preambles invariably make reference to the Charter.

<sup>43</sup>The wording of its Preamble makes its direct link to the Charter abundantly clear.

the term "human rights" and as part of international law.<sup>44</sup> The Declaration affirms the "inherent dignity and worth of the human person" (Preamble, Article 1); the right of everyone to "life, liberty and security of person," set out in unqualified terms (Article 3); the right to freedom from "torture or cruel, inhuman or degrading treatment or punishment" (Article 5); the

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<sup>44</sup>That is the position taken with regard to at least the civil rights enunciated in the Declaration. It is based on the provisions of Article 38 of the Statute of the International Court of Justice (supra note 13). It is supported by either one, or both, of the following propositions: (1) most, if not all, of the principles enshrined in the Declaration are "general principles of law recognized by civilized nations"; and (2) by subsequent "general practice accepted as law," not only has a customary rule of international law emerged whereby the Declaration has become accepted as an authoritative interpretation of the Charter provisions on human rights, and is as such binding on all member States of the United Nations (see supra note 39 and accompanying text), but moreover by reason of "general practice," the Declaration has also become part of general customary international law independent of the Charter, and thus binding on all Member States alike. See e.g.,

right to equality before the law and equal protection of the law (Article 7); and that "childhood [is] entitled to special care" (Article 25(1)).

These are provisions comparable to those of the American Declaration on the basis of

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Humphrey The Universal Declaration of Human Rights: Its History, Impact and Juridical Character, in Human Rights: Thirty Years After The Universal Declaration, 27-37 (B.G. Ramcharan ed. 1979). In the Declaration of Teheran, the official International Conference on Human Rights (April-May 1968) also set forth the conclusion that the Universal Declaration "constitutes an obligation for the members of the international community." U.N. Doc. A/CONF. 32/41, at 4. In December of 1968, the General Assembly endorsed the Declaration of Teheran. G.A. Res. 2442 (XXII), 23 U.N. GAOR, Supp. No. 18, U.N. Doc. A/7218, at 49. See also the separate opinion of Judge Ammoun in Barcelona Traction, supra note 18; and the article by Judge Lachs, The Law in and of the United Nations, 1 Ind. J. of Int'l L. 1960-61, at 429, 437-442. This view is shared even by the positivist Russian school of international law. See Tunkin, The Legal Nature of the United Nations, 3 Recueil des Cours 7, 32-37 (1966). The same view was expressed officially by then United States Secretary of State Henry Kissinger. See E. McDowell, Digest of United States Practice in International Law 1976, at 138 (Dept. of State Publication, 1977).



which the Inter-American Commission on Human Rights held adversely to the United States after finding that, by subsequent acceptance, that Declaration had acquired the binding force of conventional law (see supra, text following note 38 and text accompanying notes 35-37). By the same token, the Universal Declaration has, by subsequent acceptance, become an obligatory instrument. Therefore, by the same reasoning, its own affirmation of the right to life and equality before the law, coupled with the other provisions singled out above, operates, through the mandate of the Charter, to impose an obligation on the United States not to execute juvenile offenders.

Moreover, all the provisions of the Universal Declaration have by now been incorporated into several binding international (as well as regional) agreements, in addition to solemn declarations, by the General Assembly and other organs. These concretize, amplify and elaborate the norms set forth in

broader terms in the Universal Declaration and consistently make specific reference to the latter in their preambles.<sup>45</sup> The International Covenant on Civil and Political Rights, adopted unanimously by the General Assembly (including the United States) in 1966,<sup>46</sup> is the foremost. Its Preamble clearly links it to the Charter and the Declaration and affirms "recognition of the inherent dignity" of all persons (see also Article 10). Article 6(5), which forbids execution of

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<sup>45</sup>This aspect is factored into the equation which makes for the conclusion that, through international practice, the Declaration is recognized as laying down binding norms. Additionally, the Declaration has not only been invoked against States, but been cited and recited in a plethora of important resolutions of the General Assembly of the United Nations, often in mandatory terms and on an equal footing with the Charter. See e.g., G.A. Res. 1514 (XV, 15 U.N. GAOR, Supp. No. 16 at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1904 (XVIII), 18 U.N. GAOR, Supp. No. 16, at 35, U.N. Doc. A/5515 (1963).

<sup>46</sup>G.A. Res. 2200 (XIX), 21 U.N. GAOR, Supp. No. 16, at 52-58, U.N. Doc. A/6316 (1966) [hereinafter Covenant"].

youth under eighteen at the time of the offense, opens with an affirmation of "the inherent right to life," calls for restriction of the death penalty, and contains an indirect appeal for its total abolition.<sup>47</sup> It is apparent, therefore, that the limitations the Covenant places on executions represent the maximum concessions to retentionist States. (It need not be pointed out to this Court that limitations on rights affirmed in sweeping and emphatic terms in instruments of constitutional import are to be strictly construed.) Thus, the age limit of eighteen is to be looked upon as the absolute minimum that the Covenant countenances. This is also borne out by the

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<sup>47</sup>The Human Rights Committee established under the Covenant to monitor its implementation has stated that the "article also refers generally to abolition in terms which strongly suggest that abolition is desirable." U.N. Doc. A/37/40, pp. 93-94, para. 6 (1982). In fact, the United Nations Commission on Human Rights is currently at work on a protocol to the Covenant for the abolition of the death penalty.

travaux preparatoires, as shall be also noted below.

In view of the link between the Covenant and the Universal Declaration, Article 6(5) of the former is a reliable guide to inform the interpretation of the "right to life" provision in the latter.<sup>48</sup> The Covenant provision can, also, according to the Vienna Convention (see supra note 14, Article 31(3)), be used to authoritatively interpret the Universal Declaration by being viewed as a "subsequent agreement between the parties," a "subsequent practice in the application" of the Declaration, and/or as "relevant rules of international law."

The Covenant (like the Universal Declaration) also proscribes "cruel, inhuman

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<sup>48</sup>In the Namibia opinion, the International Court of Justice stressed that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation." See supra note 39, at 31.

or degrading treatment or punishment" (Article 7) and affirms the right to equality before the law and equal protection of the law (Article 26). It, moreover, also specifies that the "penitentiary system shall comprise treatment...the essential aim of which shall be...reformation and social rehabilitation," with juvenile offenders "segregated from adults and...accorded treatment appropriate to their age and legal status" (Article 10(3)); that in the case of juveniles "the [penal] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation" (Article 14(4)); and that "[e]very child shall have...the right to such measures of protection as required by his status as a minor, on the part of...the State" (Article 24(1)). Thus, the two instruments display a unity of design and purpose, which entitles the latter of the two to be viewed as an interpretational extension of the first. Since the Universal Declaration is binding on

all Member States as the authoritative interpretation of their obligations under the Charter relative to human rights,<sup>49</sup> by process of legitimate teleological interpretation, Article 6(5) is likewise binding on the Member States, regardless of whether or not it was when adopted declarative of customary international law or whether or not it has, since then, acquired the status of an international customary rule.

This is not an attenuated way of imposing norms on States, inasmuch as both Article 6(5) and 7 of the Covenant (the most relevant here) allow of no derogation (even in emergency). This signifies that the norms they embody lie at the core of the human rights mandate of the Charter; that they necessarily and properly flow from the Charter's matrix of international human rights law. (It is not suggested that the thesis posited above would

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<sup>49</sup>See supra notes 43-44 and accompanying text.



apply to rights which do not fit this description.)

It might be argued that since the United States upon ratification of the Covenant can make a reservation to Article 6(5), it cannot be held bound by it as a conventional rule.<sup>50</sup> But as the Covenant makes no provision for reservations, the matter is governed by general rules of international law regulating the admissibility and legal effect of reservations.<sup>51</sup> Accordingly, such a reservation would not be acceptable in view of its obvious incompatibility with the object and purpose of the treaty (Vienna Convention,

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<sup>50</sup>A reservation would be of no import if the Article is declaratory of customary law unless the reserving State has been a consistent ab initio objector. See supra note 17 and accompanying text.

<sup>51</sup>Principles enunciated in the Advisory Opinion on Reservations to the Convention on Genocide, 1951 I.C.J. 15 and codified in Articles 19-21 et seq. of the Vienna Convention (see supra notes 14, 21).

Article 19).<sup>52</sup> The fact that the existing laws and practices of individual states of the United States do not happen to conform to the norm under discussion is to no avail. It is well settled that a nation may not plead its domestic laws as justification for failure to abide by a treaty, any more than for failure to observe rules of customary international law.<sup>53</sup>

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<sup>52</sup>Id. See also Inter-American Court of Human Rights, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC - 3/83, September 8, 1983, para. 61: "a reservation...designed to enable a State to suspend any of the non-derogable...rights must be deemed to be incompatible with the purpose and object of the Convention and, consequently not permitted by it". According to information supplied by the United Nations Office of Legal Affairs, no reservations, indeed, to Article 6(5) have been entered by any of the 87 ratifying states.

<sup>53</sup>See Schachter, "The Obligation to Implement the Covenant in Domestic Law," in Henkin, ed., supra note 22, at 311, 322.

D. The United States Is also Bound by International Customary Law, and International Law Deriving from Principles of Law Recognized by Civilized Nations, that Forbid Execution of Youth for Culpable Conduct While Under Eighteen

Besides the direct legal obligation imposed on it by the aforesaid conventional rules, the United States is bound by other (or the same but differently classified) rules of international law that regulate the issue (and this is so irrespective of whether it is also bound by any treaty qua treaty). In considering this aspect, the provisions in treaties and other international and regional instruments are again relevant, albeit from a different standpoint. Also relevant are the inter-State practices of States, as well as their internal laws and practices.

In addition to the stipulations in the Geneva Convention, the Universal Declaration, the American Declaration and the Covenant (see supra text accompanying notes 38-49), there are: a) The American Convention on Human

Rights (Article 4)<sup>54</sup>; Protocol II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-international Armed Conflicts (Article 6(4)),<sup>55</sup> both of which have been signed by the United States and explicitly prohibit the execution of youths committing crimes when under eighteen; b) Protocol No. 6 to the European Convention on Human Rights<sup>56</sup> which abolishes capital punishment altogether; c) Draft Convention on the Rights of the Child, adopted by the

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<sup>54</sup>OASOR OEA/Ser. K/XVI/I.1, Doc. 65, Rev. 1, Corr. 2 (November 22, 1969) [hereinafter "American Convention"]. Its preamble links it to the Universal Declaration and it contains in Articles 5, 19 and 24 essentially the same provisions as the Covenant catalogued supra in text accompanying notes 46-47 and preceding note 49.

<sup>55</sup>Submitted to the Senate on December 13, 1986 for ratification. Message from the President, 100 Cong., Treaty Doc. 100-2, 1987.

<sup>56</sup>Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114.

Working Group on the Convention of the United Nations Commission on Human Rights, which prohibits capital punishment or life imprisonment for crimes committed by those under eighteen, as well as cruel, inhuman or degrading treatment (draft article 19(2)(a-b)).<sup>57</sup>

Additionally, there is the United Nations Declaration of the Rights of the Child, unanimously adopted by the General Assembly.<sup>58</sup> Its preamble expressly relates it both to the United Nations Charter and the Universal Declaration; underscores that the child needs "special safeguards" and "legal protection"; and expressly reminds that the need for such special safeguards had been already affirmed in the Universal

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<sup>57</sup>See U.N. Doc. E/CN.4/1986/39, Appendix.

<sup>58</sup>G.A. Res. 1386 (XIV), U.N. Doc. 4354, at 19 (November 20, 1959).

Declaration,<sup>59</sup> in the prior Geneva Declaration of the Rights of the Child of 1924<sup>60</sup> and in other instruments of global reach.<sup>61</sup> The preamble, moreover, reiterates the principle enunciated in its progenitor<sup>62</sup> that "mankind owes to the child the best it has to give." Among its ten operative principles, the Declaration states that the child "shall enjoy special protection"

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<sup>59</sup>Article 25 (1). See supra text following note 44.

<sup>60</sup>The 1924 Declaration was adopted by the Assembly of the League of Nations and was based on the Charter of the International Union for Child Welfare. It was minimally revised in 1946 by the latter's General Council. It proclaimed, inter alia, that the "child must be protected" (Article 1 of the 1946 revision) and that "the maladjusted [child] must be re-educated (Articles 2 and 4, respectively, of the original and revised versions).

<sup>61</sup>See also the provisions of special relevance to children in the subsequently enacted Covenant, supra text accompanying notes 46-49.

<sup>62</sup>Geneva Declaration of 1924, supra note 60 and accompanying text.



(Principle 2); and that the child "shall be protected against all forms of...cruelty" (Principle 9).

All United Nations sponsored human rights instruments are expressly linked to the Charter and the Universal Declaration of Human Rights.<sup>63</sup> Thus anyone of these cannot be viewed in isolation. Its juridical impact transcends its own structure. It is part of a larger organic whole, part of a constellation with unity of substance and purpose, meant to move along in unison on the international plateau of law. It has legal value beyond its own individual status as a treaty or a declaration. There is a reciprocity of influence among all of them; they feed upon

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<sup>63</sup>The draft preamble of the proposed Convention on the Right of the Child also refers to the Charter and the Universal Declaration as well as the Declarations of the Rights of the Child of 1959 and 1924. See supra note 57. The regional conventions likewise make reference to the Universal Declaration in their preambles.

each other and converge to produce a cumulative legal effect; and each must be viewed concordantly with the vision that inheres in the scheme to which it belongs.

The repeated affirmations in these instruments regarding the rights of children (right to special protection; right to freedom from "all forms of cruelty" and degrading treatment; right to equal protection of the laws; right to rehabilitation; and, of course, exemption from capital punishment), coupled with the evidence presented by Amicus Amnesty International<sup>64</sup> of formalized and customary refusal by the great majority of nations to impose death on persons under eighteen at the time of culpable conduct, clearly establish that the inadmissibility of such punishment is a principle of law recognized by civilized nations within the meaning of Article 38 of

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<sup>64</sup>Amnesty International, United States of America: The Death Penalty 74 (1987)

the Statute of the International Court of Justice. This is then an international legal norm binding on all members of the international community, regardless of whether or not they consent to it (even if the dissenters themselves generally qualify as civilized nations).<sup>65</sup>

Additionally, the norm qualifies at one and the same time as a customary norm of international law. Because of its dual character in that respect (its eligibility under more than one test of normative maturation), it would have passed the juridical threshold on the strength of its combined credentials, even if each set of them by itself was of marginal merit.<sup>66</sup> Marginality, however, is by no means the case here, and there is no need to press this ex abundanti cautela argument. This is

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<sup>65</sup>See supra note 44 and text accompanying note 18 for the opinion of Judge Tanaka of the International Court.

reinforced when one examines the norm also from the perspective of international customary law, bearing in mind that the evidence adduced along this route is equally germane simultaneously in polishing the norm's twin legal armor as a "principle of law recognized by civilized nations."

First, there is solid evidence that the norm belongs to the jus cogens genre. Every instrument which incorporates it admits of no derogation from it.<sup>67</sup> Thus it falls squarely

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<sup>66</sup>See generally supra text accompanying notes 19-26.

<sup>67</sup>See Covenant, supra note 46, Art. 4(2). See also American Convention, supra note 54, Art. 27(2). Even the prohibition of the Covenant against not only cruel, but degrading, punishment or treatment is not derogable (see id), which illustrates by comparison the supreme importance of the norm against execution of juveniles. The American Convention (see id) additionally makes non-derogable not only the prohibition of cruel or degrading punishment or treatment (Article 5(2), but also "the right" of the child to such measures of protection as are required by his status as a minor (Article 24). See also Arts. 3-4 of Protocol No. 6 to the European Convention (see supra text accompanying note 56).

within the jus cogens definition of the Vienna Convention (see supra note 27), not to mention the various authoritative references to basic human rights norms as being jus cogens.<sup>20</sup> The United Nations Commission on Human Rights has, indeed, accepted the thesis that this and other non-derogable norms are inalienable and peremptory within the meaning of the Vienna Convention.<sup>21</sup> By definition, of course, a jus cogens norm is binding on one and all, even dissenters (see supra note 27 and accompanying text). In view of the above, any further inquiry can be deemed foreclosed; there is no need to survey practices of States nor to examine the attitude of the United States with regard to any aspect of the matter.

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<sup>20</sup>See supra text accompanying and following note 29.

<sup>21</sup>See U.N. Doc. E/CN. 4/Sub. 2/1982/15, pp. 18-19, para. 67 et seq.

Assuming arguendo that the norm does not qualify as jus cogens, or even as a principle of law recognized by civilized nations, which is by no means conceded, its mere candidacy for these mantles adds a lot of extra weight to the proposition that it qualifies as a norm of customary international law. Even if one discounts the thesis that human rights norms more readily pass into the juridical mainstream (see supra text accompanying notes 19 to 26), the evidence is overwhelming that this particular norm has done so. A few of the applicable considerations merit emphasis.

A stipulation in a treaty is binding on non-parties if it is declaratory of a pre-existing norm of customary law or if it subsequently acquires the status of a customary rule (Vienna Convention, supra note 14, Article 38). The rule under discussion had been universally accepted in the Geneva Convention (supra note 38) for seventeen



years prior to the adoption of the Covenant (see supra text accompanying notes 46-49) (and had even pre-dated the Convention<sup>70</sup>). The drafters of the Covenant took it as a given that execution of juveniles was a proscribed thing.<sup>71</sup> The proscription was thus already a customary rule.

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<sup>70</sup>See III Final Record of the Diplomatic Conference of Geneva of 1949, Annexes, p. 131, Art. 59; International Committee of the Red Cross, Commentary, IV Geneva Convention, p. 347.

<sup>71</sup>The Working Group of the Committee of the General Assembly working on the Covenant (Third Committee), after considering a proposal that would exclude from the death penalty "children and young persons" (Japan), recommended to the Committee that it choose from among the following words: "minors," "juveniles," and "persons below eighteen." The Committee opted for the last as being the most succinct. Report of the Third Committee U.N. Doc. A/3764 (1957), 12 GAOR, Annexes, Agenda It. 33, pp. 10-11, paras. 93, 105. Prior to the vote the U.K. representative objected to the term "minors" as it "specifically meant persons under twenty-one." 12 GAOR, C.3/SR. 820, para. 3 (25 Nov. 1957). Other reasons for the choice made were that it was in harmony with the practices of most countries; was the prescription used in the Geneva Convention of 1949; and would impose an equal obligation on all States. Id.

The Covenant thereafter became widely ratified by nations representing all regions and legal systems (eighty seven nations so far and increasing each year), all unreservedly acceding to its Article 6(5) (see supra note 52).<sup>72</sup> "[A] very widespread and representative participation in the convention [can] suffice of itself" to transform a treaty stipulation (a purely conventional rule) into a rule of customary law, "even without the passage of a considerable length of time." North Sea Continental Shelf Cases, 1969 I.C.J. 42. (The treaty by itself, under the circumstances provides the requisite elements

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para. 21; id. SR. 812, para. 25; id. SR. 813, para. 32; id. SR. 817, para. 33; id. SR. 819, para. 10. Thus the age of eighteen was seen as the minimum cutoff point.

<sup>72</sup>The delay by some States in ratifying the Covenant can be attributed to such factors as its burdensome reporting procedures, which no doubt some States are not too anxious to undertake.

of State practice and opinio juris, without the need to examine other items<sup>73</sup>). A fortiori we have a customary rule of international law when, as here, the rule has been codified for twenty-two years (counting as of the adoption of the Covenant alone); was recognized as a customary rule beforehand; was reaffirmed in other normative instruments thereafter, including the American Convention (see supra note 54) and such as the Resolution by the General Assembly of 1980 (for which the United States voted) endorsing the view that Article 6 of the Covenant constitutes "a minimum standard" for all Member States (not just ratifying States)<sup>74</sup>;

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<sup>73</sup>See generally Baxter, Multilateral Treaties as Evidence of Customary International Law, XLI Brit. Y.B. Int'l L. 275 (1965-1966).

<sup>74</sup>G.A. Res. 35/172, 35 U.N. GAOR, Supp. No. 48, U.N. Doc. A/35/48, at 195 (1980). Like a treaty, a resolution of the General Assembly can be viewed as a constitutive element of State practice or as evidence of State practice, or both, as well as a vehicle for expressing opinio juris. Important,

and is amply reflected in intrastate practice.

Even as an ordinary rule of customary international law (even if not jus cogens or a rule deriving from "principles of law recognized by civilized nations") the norm embodied in Article 6(5) of the Covenant is binding on the United States, being that this country does not qualify as an ab initio consistent objector, as the evidence presented in this and in companion briefs conclusively shows (the long-standing full adherence of the United States to the Geneva Convention of 1949 alone should be determinative here).<sup>75</sup> An important consideration in this connection is the fact

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broadly supported resolutions can, moreover, be viewed as a source of international law, additional to treaty and custom. See the Namibia opinion supra note 39, at 50-57; Western Sahara Case, 1975 I.C.J. 12; separate opinion of Judge Ammoun supra note 18.

<sup>75</sup>See AMNESTY INTERNATIONAL brief on the travaux preparatoires of the International Covenant and the American Convention on Human Rights.

that any expressed reservations on the part of United States officials with regard to provisions such as Article 6(5) of the Covenant have been voiced in terms of the inconvenience and delicate internal jurisdictional considerations that such stipulations would entail by reason of the inconsistency between them and current laws in the United States. This is not a substantive reservation; not an objection in principle.<sup>76</sup> Moreover, United States diplomatic representatives have seen fit not to dissent against, and even support, United Nations resolutions re-affirming the norm

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<sup>76</sup>See supra text accompanying note 53 regarding the import of pleading domestic law as against international standards. The purpose of international human rights law is to uplift national standards and not to emulate the least common denominator.

(such as the resolutions on Article 6(5) of the Covenant and "The Beijing Rules").<sup>77</sup>

Thus the prohibition contained in Article 6(5) of the Covenant and other international instruments is part of the federal common law and ipso jure supercedes contravening state legislation. It should, at least be held to conclusively inform this Court's interpretation of relevant provisions of this nation's Constitution (particularly as, even in its absence, such interpretation cries for the same result). Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 1, 43 (1804); Weinberger v. Rossi, 456 U.S. 25, 33 (1982).<sup>78</sup>

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<sup>77</sup>See supra note 74 and accompanying text; AMNESTY INTERNATIONAL brief, footnote (as to President Carter's Message to the Senate of Feb. 27, 1978) and text preceding the "Conclusion".

<sup>78</sup>See also, Schachter, supra note 53, at 315.



## CONCLUSION

For the reasons above stated, Amicus DCI prays that this Court spare the life of the petitioners; and strike down laws, such as the statutes under review, which allow such unconscionable cruelty to be perpetrated on persons of young age. Surely, in this day and age, the state-killing of petitioners, or others like them, is not "the best that mankind has to give" our children. Opening the door to such practices would be the ultimate betrayal of a sacred trust of civilization. It would be a giant retrograde step of global proportions in the progressive development of the rule of law.

Respectfully submitted,

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Nos. 87-5666 and 87-6026

87-5765

Supreme Court, U.S.  
FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,  
*Petitioner*

v.

WALTER ZANT,  
*Respondent*

On Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit

HEATH A. WILKINS,  
*Petitioner*

v.

STATE OF MISSOURI,  
*Respondent*

On Writ of Certiorari to the Missouri Supreme Court

**BRIEF OF AMICUS CURIAE  
THE AMERICAN BAR ASSOCIATION**

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1988

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**BRIEF OF AMICUS CURIAE  
THE AMERICAN BAR ASSOCIATION**

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**INTEREST OF THE AMICUS CURIAE**

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its over 343,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes prosecutors, public defenders, private attorneys, trial and appellate judges

at the state and federal levels, legislators, law enforcement and corrections professionals, law school deans, law professors, law students, and a number of non-lawyer associates in allied fields.

Since its inception over one hundred years ago, the ABA has taken an active interest in improving the administration of justice. It has also taken a special interest in the improvement of the juvenile justice system. Toward these ends the ABA has promulgated two comprehensive sets of standards, the *ABA Standards for Criminal Justice* and, in conjunction with the Institute of Judicial Administration (IJA), the *IJA/ABA Juvenile Justice Standards*.

The IJA/ABA Juvenile Justice Standards Drafting Project, which was completed in 1980 with the adoption of the *Juvenile Justice Standards*, involved one of the most thorough studies of our society's response to the problems of juvenile crime ever undertaken. The Standards not only provide a thorough analysis of the historical, legal, and criminological developments in society's effort to respond to juvenile crime, but, because of the diversity of disciplines and perspectives represented by the contributors, the Standards in many ways reflect our society's knowledge, attitudes and values about children who commit crimes. The Project took no position on the death penalty.

In 1983, however, the ABA House of Delegates adopted a resolution opposing, on policy grounds, capital punishment for crimes committed by minors under the age of eighteen years [hereinafter referred to as the "juvenile death penalty"]: "BE IT RESOLVED, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." ABA, *Summary of Actions of the House of Delegates, 1983 Annual Meeting, Reports of Sections 17*. The House of Dele-

gates took no position on the constitutionality of the juvenile death penalty. The adoption of the House resolution followed almost two years of research and consideration of the issue by the ABA Section on Criminal Justice, as summarized in its Report to the House of Delegates in support of the resolution. ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates*, Report No. 117A (August 1983) (hereinafter cited "ABA Juvenile Death Penalty Report").

The imposition of the death penalty for crimes committed by minors presents its own special concerns of justice. This claim is underscored by the fact that the ABA has rejected resolutions to limit the use of the death penalty for adults. In 1977, the ABA Section on Individual Rights and Responsibilities proposed a resolution urging the state legislatures to abolish the death penalty in all cases. That resolution failed by a 168-69 vote. ABA *Summary of Actions of the House of Delegates, 1977 Mid-year Meeting, Reports of Sections 18*. In 1979, the ABA Criminal Justice Section proposed a resolution to approve sentencing guidelines limiting the circumstances under which capital punishment could be imposed. That resolution failed in the House of Delegates by voice vote. ABA *Summary of Actions of the House of Delegates, 1979 Annual Meeting, Reports of Sections 23*. This year the House of Delegates passed a resolution supporting the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing, while again emphasizing that "this resolution does not create a position for the ABA on whether or not capital punishment is an appropriate criminal sanction." ABA *Summary of Actions of the House of Delegates, 1988 Annual Meeting, Reports of Sections —*.

The ABA participated as amicus curiae in *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988), and set forth in its



brief the considerations which led to the ABA position that the juvenile death penalty cannot be reconciled with contemporary societal values. Although a number of these considerations were acknowledged in the plurality and concurring opinions in *Thompson*, the Court did not reach the issue of the constitutionality of imposing capital punishment for crimes committed by minors under the age of eighteen. The ABA participates as amicus curiae in these cases to underscore the Association's position that for reasons central to our perceptions of ourselves as a civilized society the death penalty should not be imposed upon any person for any offense committed while under the age of eighteen.

#### SUMMARY OF ARGUMENT

Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults. See IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3 (1980). In light of these characteristics, minors are neither entitled to all the rights and privileges of adulthood, nor are they given the full obligations of adulthood until they reach their eighteenth birthdays. See, e.g., U.S. Const. amend. XXVI, § 1.

Because our criminal justice system is based on concepts of individual responsibility, the differences between minors and adults in their capacities to assume such responsibility, recognized in other legal contexts, should be reflected in our response to crimes committed by minors. The development of the juvenile justice system is the clearest manifestation of society's commitment to this principle of separate treatment of adult and juvenile offenders. Notwithstanding the distinctions in law and fact between minors and adults, the juvenile justice system cannot deal with all juvenile crime. Some minors who commit serious crimes must be subject to trial and sen-

tencing in the criminal justice system in order adequately to protect society and vindicate the criminal laws. However, the fact that a minor is appropriately tried in the criminal justice system does not mean that the ultimate criminal sanction, execution, is appropriate.

The special nature of childhood in our society led to the ABA position against the juvenile death penalty and is directly relevant to the issue before the Court. The death penalty is reserved for people whose crimes are so severe, whose character is so depraved, and whose moral culpability is so great as to warrant the ultimate sanction. See generally *Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976). For the same reason we in other legal contexts conclusively presume that minors under the age of eighteen are not mature and responsible to the same extent as adults, they should not be held to the degree of moral accountability necessary to justify the ultimate sanction of execution.

#### ARGUMENT

**BECAUSE THE LAW CONCLUSIVELY AND PRUDENTLY PRESUMES THAT MINORS UNDER THE AGE OF EIGHTEEN ARE NOT CAPABLE OF EXERCISING THE FULL RESPONSIBILITIES OF ADULTHOOD, THEY SHOULD NOT BE HELD TO THE LEVEL OF MORAL ACCOUNTABILITY NECESSARY TO JUSTIFY THE IMPOSITION OF THE PUNISHMENT OF DEATH.**

Although the ABA has taken no position on the constitutionality of the juvenile death penalty, the reasons for opposing that sanction as a matter of policy are relevant to this Court's consideration of the constitutional issue. The ABA policy both derives from and reflects the special significance that our society attaches to the status of minority—a special significance that shapes and defines the issue in this case.

As this Court has observed in a number of different contexts, "children have a very special place in life which the law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). In cases which present fundamental questions involving minors—in this case questions of life and death—we cannot ignore the significance of the status of minority. "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." *Id.*

Minors are "most susceptible to influence and psychological damage" and "lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental." *Bellotti v. Baird*, 443 U.S. 602, 635 (1979). They are in the early stages of their emotional growth; their intellectual development is incomplete; they have only limited practical experience; and their value systems are not yet clearly identified and firmly adopted. *Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984) (citing *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 350 N.E.2d 906 (1976)). Unlike adults, minors are always in some form of custody and subject to the control of their parents or the state as *parens patriae* upon whom the responsibility of making important decisions for the minor traditionally rests. *Schall v. Martin*, 467 U.S. at 265; *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

It is only upon the premise that a minor "is not possessed of that full capacity for individual choice . . . that a state may deprive children of . . . rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). The law thus "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring.)

This recognition is apparent in the development of a separate juvenile justice system for dealing with juvenile crime. Separate treatment of juveniles for their criminal conduct is a relatively recent development. Under common law, children over the age of seven (the age below which a child was considered incapable of possessing criminal intent) were subjected to criminal prosecution and punishment like adult offenders. *In re Gault*, 387 U.S. 1, 16 (1967). However, reaction to the harshness of a system that made no distinction between minor and adult when criminal conduct was involved was widespread and led to the development of separate juvenile justice systems in every jurisdiction in the country. *Id.* at 14-15. The underlying premise of this separate system was that minors are less mature, less able to exercise control and judgment, more easily influenced by others and by their environment and thus less culpable than adults for their actions.

Despite the more recent recognition that the achievements of separating systems of juvenile and criminal justice have fallen short of the goals, *see id.* 387 U.S. at 17-18, our society has not abandoned the underlying premise that minors who commit crimes should be treated differently from adults. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 258 (1973); *Schall v. Martin*, 467 U.S. 253 (1984). Thus, the IJA/ABA *Juvenile Justice Standards*, which provide a candid critique of the juvenile justice system and call for considerable system reform, nevertheless reaffirm the vitality of this underlying principle.<sup>1</sup> *See IJA/ABA Standards for Juvenile Justice: Summary and Analysis* 40-41 (1982).

<sup>1</sup> There is a tendency to distinguish the juvenile justice system from the criminal justice system by contrasting the "rehabilitative" goals of the former with the "punitive" goals of the latter. However, as this Court has noted, the juvenile justice system has punitive characteristics, *see In re Gault*, 387 U.S. at 27-30; and the criminal justice system is not unconcerned with treatment and



While not addressing the death penalty issue directly, the IJA/ABA *Juvenile Justice Standards* deal specifically with the issue of subjecting some minors who commit crimes to the jurisdiction of the criminal court. Notwithstanding our recognition that minors should not be held to the same standards of criminal responsibility as adults, the protection offered by the juvenile justice system is not appropriate for some minors. IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3. Some acts are so offensive to the community that only criminal court jurisdiction can ensure that control is maintained over the juvenile offender for a period proportionate to his offense and prior record. *Id.* However, the existence of a mechanism for transfer of jurisdiction and the acceptance of the necessity of being able to exercise criminal court jurisdiction over children for commission of serious crimes does not establish the propriety of treating a minor as an adult for the specific and extreme purpose of imposing the death penalty. The transfer decision—whether discretionary with the judge or prosecutor or mandated by the legislature—does not involve a determination that a minor is as mature as an adult and often involves no consideration of individual maturity, especially when the offense is most serious. See Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. Rev. 757, 771-72 (1986); Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1476-79 (1983). Rather the transfer of jurisdiction is often a pragmatic

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rehabilitation. See *Breed v. Jones*, 421 U.S. 519, 530 n.12 (1975). In the ABA's view, whether the guiding principle articulated is treatment, rehabilitation, protection of society through deterrence, or retribution, it is the fact of childhood and the fundamental differences between minors and adults that are the critical factors which ultimately provide the rationale for separate systems. See IJA/ABA *Juvenile Justice Standards Relating to Dispositions*, Standard 1.1 and commentary thereto (1980).

decision that the limited jurisdiction of the juvenile justice system cannot provide adequate protection for the community. See *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2707 (1988) (O'Connor, J., concurring).

The factors that warrant transfer and the concomitant decision to subject the minor to the lengthy sentences available in criminal court thus do not resolve the issue of the propriety of the death penalty for the minor who is transferred. It is not at all incongruous to find states in which the juvenile death penalty had been statutorily permissible lowering the minimum age for transfer to adult court as part of "getting tough" on juvenile crime while at the same time eliminating the juvenile death penalty. See, e.g., Tenn. Code Ann. § 37-1-134(1) (1984) (1982 amendments); Or. Rev. Stat. §§ 161.620 (1985), 419.533 (1983) (1985 amendments).

The issue before this Court is whether a minor under the age of eighteen can, consistent with the Eighth Amendment, be held to that level of responsibility and moral culpability for which society reserves the penalty of death. The words of the Eighth Amendment proscribing imposition of criminal penalties which are cruel and unusual, "are not precise and . . . their scope is not static." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). The meaning of the Amendment is drawn "from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Thus, punishments which may have been accepted by society when this amendment was adopted can come to be viewed in our time as excessive and unconstitutional. *Gregg v. Georgia*, 428 U.S. at 171 (opinion of Stewart, Powell and Stevens, JJ.).

The death penalty is different in kind from any other criminal punishment; it is "unique in its severity and irrevocability." *Id.* at 187. In light of this, this Court has held that the discretion to impose the death penalty



must be limited and directed to ensure that it is not inflicted in an arbitrary and capricious manner. *Zant v. Stephens*, 462 U.S. at 874. Not only must the sentencing authority be provided guidelines, but it must be able to consider any and all mitigating factors, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), including the character and record of the individual and the circumstances of the particular offense, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.) and must in fact consider such mitigating factors. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

In certain situations, however, the Court has refused to allow the sentencing authority the discretion to determine whether a defendant should live or die based on a balancing of aggravating and mitigating circumstances presented by the individual case. If the crime is the rape of an adult woman and it does not result in the death of the victim, the death penalty is prohibited. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). If the crime results in the death of the victim, but the person charged is guilty of felony murder *simpliciter*, the death penalty is prohibited. *Enmund v. Florida*, 458 U.S. 782, 788 (1982). For felony murders, the standard appears to be that the death penalty may be imposed if the defendant is a major participant in the felony committed who acted intentionally or with reckless indifference to human life. *Tison v. Arizona*, 107 S.Ct. 1676, 1688 (1987). Thus, there are situations in which ensuring an individualized consideration of the circumstances of the offense simply does not satisfy the Eighth Amendment; this Court has therefore prohibited execution in such cases.

This Court has already recognized that the youth of a defendant is a mitigating factor which is entitled to great weight, *Eddings v. Oklahoma*, 455 U.S. at 116. In *Thompson v. Oklahoma*, four members of this Court

held that the youth of the defendant alone, at least where the child is under the age of sixteen, is an absolute bar to execution, 108 S.Ct. at 2700, and one Justice, although concurring on narrower grounds, indicated her belief that the plurality was probably correct. 108 S.Ct. at 2706 (O'Connor, J., concurring). The issue in this case is whether, when the crime is committed by a minor under the age of eighteen, the fact of minority is of such overriding importance that a bright line must be drawn prohibiting execution.

In determining whether a particular punishment once tolerated can no longer be reconciled with our advancing standards of decency, the Court has looked to various indicia of contemporary values and attitudes. *Coker v. Georgia*, 433 U.S. at 592 n.10. As the plurality noted in *Thompson v. Oklahoma*, the position of the ABA itself is an indicator of such values and attitudes. See *Thompson v. Oklahoma*, 108 S.Ct. at 2696. The House of Delegates which sets ABA policy is composed of representatives of every state and reflects the broad spectrum of political and social views of the legal community. See Appendix A (ABA Constitution and Bylaws concerning composition of House of Delegates). The fact that the ABA, which has not opposed the death penalty for adults, is opposed to the death penalty for juveniles, is one reflection of the national consensus on this issue.

Moreover, the ABA Juvenile Death Penalty Report considered other indicia of contemporary values and attitudes such as international and legislative norms in concluding that a civilized society should no longer allow execution for crimes committed by minors. The ABA considered evidence, documented by the plurality opinion in *Thompson v. Oklahoma*, 108 S.Ct. at 2696, that the juvenile death penalty is overwhelmingly rejected in the international community. The ABA also found evidence of the unacceptability of the juvenile death penalty in the increasing number of states that upon specific con-

sideration of the application of the death penalty to persons below the age of eighteen have rejected it. See *Thompson v. Oklahoma*, 108 S.Ct. at 2696 n.30. This evidence was particularly compelling in light of the reenactment of the death penalty in thirty-five jurisdictions since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

Finally, the ABA Juvenile Death Penalty Report considered the role of a death penalty for juveniles in furthering deterrence and retribution, two values recognized by this Court as legitimate bases for imposing criminal penalties including capital punishment. *Gregg v. Georgia*, 428 U.S. at 183 (1976) (opinion of Stewart, Powell and Stevens, JJ). The report concluded that these justifications "... lose much of their persuasiveness when applied to an adolescent's case." ABA Juvenile Death Penalty Report 8-9. Whatever deterrent effect might exist for potential adult offenders, *Gregg v. Georgia*, 428 U.S. at 184-85, in light of the characteristics associated with childhood—impulsiveness, lack of self control, poor judgment, feelings of invincibility—the deterrent value of the juvenile death penalty is likely of little consequence. In any event, it would be difficult to support a claim that the death penalty as a deterrent for juvenile crime, as opposed to life imprisonment, "is an indispensable part of the State's criminal justice system." *Coker v. Georgia*, 437 U.S. at 592 n.4. Whatever deterrent value might exist is insignificant when balanced against the societal values compromised by the juvenile death penalty.

Retribution, defined by this Court as "the expression of society's moral outrage at particularly offensive conduct" *Gregg v. Georgia*, 428 U.S. at 183, is also an unsatisfactory justification for the juvenile death penalty. The moral force of—and thus the legal justification for—taking human life in retribution is dependent on the degree of culpability of the offender, and not just on the injury to the victim. See *Enmund v. Florida*, 458 U.S. at

800. Because of our societal attitudes and well-founded legal presumptions regarding the status of minority, a minor simply cannot be held to that degree of culpability and accountability.

Lines drawn on the basis of age inevitably appear arbitrary for those near the line of demarcation. However, as a society we must in important matters of legal rights and responsibilities make distinctions based on age alone that are absolute and allow no exceptions for the particularly responsible or irresponsible person of that age. In areas in which the rights exercised or the responsibilities imposed are of the highest order in our society—the right to vote and the responsibility to serve on a jury—every jurisdiction conclusively presumes that children under the age of eighteen, no matter how mature, are incapable of exercising adult responsibility. See *Thompson v. Oklahoma*, 108 S.Ct. at 2701, Appendices A and B. Even the dissent recognizes that at some point age alone must be held to be an absolute bar to execution. *Thompson v. Oklahoma*, 108 S.Ct. at 2714. The ABA submits that the appropriate point to draw the line for purposes of the death penalty is at the age of eighteen.

### CONCLUSION

The death penalty should not be imposed upon any person for any offense committed while under the age of eighteen.

Respectfully submitted,

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**APPENDIX A**

American Bar Association, Constitution and Bylaws; Rules of Procedure House of Delegates; Article 6, Section 6.1 and 6.2 (1987-88).

**Article 6. The House of Delegates**

§ 6.1 Powers and Functions. The House of Delegates shall control, formulate policy for, and administer the Association. It has all the powers necessary or incidental to performing those functions. It shall supervise and direct the Board of Governors, officers, sections, committees, and employees and agents of the Association. It may adopt rules consistent with the Constitution and Bylaws. It is the judge of the election and qualifications of its members.

§ 6.2 Composition. (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:

The State Delegates, one for each state, who also serve as chairmen of the delegate groups from the respective states.

The state bar association delegates, at least one for each state.

The delegates from eligible local bar associations, one for each eligible association.

The Assembly Delegates elected by the Assembly, 15 in number.

The delegates representing the respective sections of the Association, at least one for each section and the Senior Lawyers Division except four for the Young Lawyers Division (including the Young Lawyers Division representative on the Nominating Committee), and two for the Law Student Division.

The delegates representing the following conferences of the Judicial Administration Division: One each for



the Appellate Judges' Conference, the National Conference of State Trial Judges, the National Conference of Special Court Judges, the National Conference of Federal Trial Judges, and the Conference of Administrative Law Judges.

The members of the Board of Governors, except the administrative officer.

The former elected members of the Board of Governors, for two Association years immediately following the end of their respective terms.

The former presidents of the Association and former chairmen of the House of Delegates; provided that all former presidents or chairmen elected to those positions after August 15, 1975, shall be full voting members of the House for ten years after the conclusion of their service as president or chairman and with voice but no vote thereafter.

The former secretaries and former treasurers of the Association who have had three or more years of service as such, as except that a former officer first elected to an office that qualifies him under this provision after August 15, 1975, may serve for only the five Association years immediately following the end of this term.

The Attorney General of the United States or, at his option, the Deputy Attorney General or the Solicitor General.

The Director of the Administrative Office of the United States Courts.

The delegates from affiliated organizations, one for each organization.

(b) Beginning in 1995 and at least once every ten years thereafter, a review of the representation in the House in terms of Association membership shall be conducted to ensure appropriate representation of the above constituencies.

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No. 87-5666/87-6026

Supreme Court, U.S.

FILED

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CLERK

87 - 5765  
IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

JOSE MARTINEZ HIGH,

*Petitioner,*

vs.

WALTER ZANT, WARDEN,

*Respondent.*

HEATH A. WILKINS,

*Petitioner,*

vs.

STATE OF MISSOURI,

*Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT AND TO THE SUPREME  
COURT OF THE STATE OF MISSOURI

## BRIEF OF THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY AND THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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September 2, 1988

439W

Question Presented for Review

1. Is the execution of an individual who was under the age of 18 at the time he or she committed a capital offense cruel and unusual punishment in violation of the Eighth Amendment?



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### INTEREST OF AMICI CURIAE

The American Society for Adolescent Psychiatry and the American Orthopsychiatric Association file this brief as *amici curiae* in support of petitioners by written consent of all parties, pursuant to Rule 36.2 of the Rules of this Court. We are informed that parties' letters of consent are on file with the Clerk.

The American Society for Adolescent Psychiatry ("ASAP") (S. Dion Smith, M.D., President) was founded in 1967 and today has approximately 1,400 members. ASAP provides a national forum for adolescent psychiatry and promotes the exchange of psychiatric knowledge about adolescents. Since its founding, ASAP has supported research on the normal development, as well as the psychopathology and treatment, of adolescents, helped to broaden knowledge and understanding of the various factors that may influence adolescent development and substantially improved the psychiatric community's ability to recognize and diagnose psychiatric problems common in adolescents. Half of ASAP's members are child psychiatrists, while the remaining members are general psychiatrists and psychoanalysts who maintain an active professional interest in adolescents. Its members work with adolescents in hospitals, schools and psychiatric clinics around the country as well as within the nation's juvenile court system.

The American Orthopsychiatric Association ("Ortho") (Bernice Weissbourd, M.A., President) was established in 1924 and has traditionally been concerned with the problems, causes, treatment and prevention of psychiatric disturbances. It is an organization comprised of more than 10,500 members representing a variety of mental health-related professions — psychiatry, psychology, psychiatric nursing, social work, education and the law — including experts in adolescent development. With its broad-based membership, Ortho has consistently helped to shape public policy in the mental health and human development field from varying professional perspectives.

*Amici* sponsor a wide array of educational programs for their members and other mental health professionals. In addition, each *amicus* publishes a scientific journal.

*Amici* are organizations with extensive background and experience in adolescent development. This brief is intended to provide the Court with relevant data that will enable it to judge

the critical issue herein effectively, fairly and with greater knowledge of adolescents' developmental capabilities. Adolescents are developmentally different from adults. Accordingly, *amici* strongly urge the Court to spare adolescents the imposition of capital punishment.

### SUMMARY OF ARGUMENT

The law has historically recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently. This view is confirmed by a vast body of clinical research and literature. Psychiatrists and psychologists have demonstrated that adolescents have not yet developed many of the psychological, cognitive and emotional characteristics of mature adults. Adolescents tend to be less mature, more impulsive and less capable of controlling their conduct and thinking in terms of long-range consequences. Adolescence is a stage of human development in which one's character and moral judgment are incomplete and still undergoing formation. An adolescent's character structure is more flexible than an adult's and remains open to major modifications. (Point I)

Adolescents who commit capital offenses typically suffer from a variety of serious disturbances which inhibit their natural development. They come from chaotic families, have been exposed to extreme violence, suffer severe cognitive limitations, and frequently have long-standing psychiatric and neurological problems. These factors tend to exacerbate the existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior. The findings of a recently completed study of persons on death row who committed capital offenses in their adolescence are consistent with this general understanding about youthful offenders. Heath Allen Wilkins exhibits all of the characteristics typical of this distinct subgroup. Jose Martinez High has never been afforded a comprehensive psychiatric and neurological examination. It is reasonable to expect that a thorough evaluation of Jose would reveal the same type of abnormalities found in all other adolescents on death row. (Point II)

The Eighth Amendment forbids the infliction of cruel and unusual punishment. Punishment is inherently cruel and unusual if it is disproportionate to the crime or to the offender's moral culpability for that crime, or if it fails to make any measurable

contribution to acceptable goals of punishment. As applied to adolescents, capital punishment is both disproportionate and makes no measurable contribution to acceptable goals of punishment. It is disproportionate as applied to youthful offenders because youths, given their incomplete psychological and emotional development, are less culpable than adults for their offensive acts. The death penalty is also contrary to the only legitimate aims of punishing the young: rehabilitation and treatment. Finally, in light of contemporary human understanding about adolescents generally and adolescents who commit capital offenses in particular, the death penalty as applied to adolescents is contrary to contemporary standards of decency. Execution of adolescents is therefore inherently cruel and unusual in violation of the Eighth Amendment. (Point III)

### ARGUMENT

#### I

#### PSYCHIATRISTS, PSYCHOLOGISTS AND OTHER ADOLESCENT DEVELOPMENT EXPERTS RECOGNIZE THAT ADOLESCENCE IS A TRANSITIONAL PERIOD BETWEEN CHILDHOOD AND ADULthood IN WHICH YOUNG PEOPLE ARE STILL DEVELOPING THE COGNITIVE ABILITY, JUDGMENT AND FULLY FORMED IDENTITY OR CHARACTER OF ADULTS

The law has always recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently.<sup>1</sup> As this Court said:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

<sup>1</sup> Examples of this different treatment include limitations on youths' rights to vote, contract, serve as jurors, purchase liquor, marry, drive motor vehicles, enlist in the armed services, or accept employment. See generally F. Zimring, *The Changing Legal World of Adolescence* (1982).



*Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). This view is confirmed by a vast body of clinical research and literature.<sup>2</sup>

Psychiatrists, psychologists and other child development experts have demonstrated that adolescents are at a stage of development in which they lack the cognitive ability,<sup>3</sup> judgment and fully-formed identity or character of adults. "[A]dolescence is the transitional period between childhood and adulthood. It begins with the biological events of puberty and continues through a complex series of psychological and sociocultural events and influences to the establishment of an independently functioning person."<sup>4</sup> Age 18 is a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.<sup>5</sup>

<sup>2</sup> See, e.g., Brunstetter & Silver, *Normal Adolescent Development*, in 2 *Comprehensive Textbook of Psychiatry* 1608 (H. Kaplan & B. Sadock 4th ed. 1985); Hamburg & Wortman, *Adolescent Development and Psychopathology*, in 2 *Psychiatry* ch. 4 (J. Cavenar ed. 1985); *Handbook of Clinical Child Psychology* (C. Walker & M. Roberts eds. 1983); M. Lewis, *Clinical Aspects of Child Development* (2d ed. 1982); S. Ambron, *Child Development* (3d ed. 1981); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979); M. Rutter, *Changing Youth in a Changing Society* (1979); Graham & Rutter, *Adolescent disorders*, in *Child Psychiatry: Modern Approaches* 407 (M. Rutter & L. Hersov eds. 1977).

<sup>3</sup> Cognition refers to the processes involved in perception, memory, reasoning, reflection, and insight. P. Mussen, J. Conger & J. Kagan, *supra* note 2, at 233-34.

<sup>4</sup> Brunstetter & Silver, *supra* note 2, at 1608.

<sup>5</sup> See, e.g., Hammar, *Adolescence*, in 1 *Practice of Pediatrics* ch. 4, at 1 (V. Kelley ed. 1987) (adolescent growth and development occurs from age 10 through age 20); Brunstetter & Silver, *supra* note 2, at 1608 ("most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school"); Hamburg & Wortman, *supra* note 2, at 8 (an adolescent does not develop autonomy, a sense of self and a sense of identity until his or her early 20s); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues: A Review of Cross-sectional, Longitudinal, and Sequential Studies in the Defining Issues Test*, 49 *Child Development* 263, 276-77 (1978) (development of moral judgment continues throughout a person's early 20s); Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, *Daedalus* 1051, 1065, 1072 (Fall 1971) (development of formal reasoning and principled moral judgment continues into a person's early 20s).

(footnote continued)

An adolescent's intellectual growth is incomplete and his or her reasoning skills and logic are immature. From a cognitive perspective, adolescents are in the process of moving from "concrete operational thought" to "formal operational thought."<sup>6</sup> An adolescent begins to consider the possible as well as the actual.<sup>7</sup> These new cognitive skills develop continuously and "most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school."<sup>8</sup> Formal, abstract reasoning is a complex ability that is influenced by training and experience.<sup>9</sup> Therefore, although adolescents begin to acquire a broader awareness, they lack the judgment necessary to choose carefully among various possibilities and to appreciate the future consequences of their actions.

Behaviorally, the effects of an adolescent's developing cognitive ability include increased impulsiveness, experimentation and risk-taking. An adolescent's newly forming capacity to reason abstractly, coupled with his or her "fascination with the possible," results in a desire to explore various behaviors.<sup>10</sup> However, because of an adolescent's limited experience and lack of ability to assess future consequences, he or she is unable to conceptualize realistically the potential negative outcomes of certain actions. This difficulty contributes to a young person's feelings of invulnerability to personal risk.<sup>11</sup> Hence adolescents often engage in alcohol and drug use/abuse, sexual experimentation, reckless use of motor vehicles and other potentially destructive behaviors.<sup>12</sup>

Traditionally, our society, through our legal system, has chosen age 18 as the dividing line between adolescence and adulthood. See, e.g., *Thompson v. Oklahoma*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2687, 2701-02 (1988) (appendices listing state statutes that set age 18 as the minimum voting age and the minimum age for jury service). Psychiatrists and psychologists consider this a reasonable choice. See Hamburg & Wortman, *supra* note 2, at 3.

<sup>6</sup> Cognitive capacity develops in a sequence of stages. Jean Piaget is credited with documenting this growth and providing the terminology for these stages. See B. Inhelder & J. Piaget, *The Growth of Logical Thinking from Childhood to Adolescence* (1958); H. Ginsburg & S. Oppen, *Piaget's theory of intellectual development* (1969).

<sup>7</sup> See, e.g., S. Ambron, *supra* note 2, at 432-33.

<sup>8</sup> Brunstetter & Silver, *supra* note 2, at 1608.

<sup>9</sup> *Id.*

<sup>10</sup> Irwin & Millstein, *Biopsychosocial Correlates of Risk-Taking Behaviors*, *J. Adolescent Health Care*, Vol. 7, No. 6S, 82S, 87S (November 1986 Supplement).

<sup>11</sup> *Id.* at 87S.

<sup>12</sup> *Id.* at 82S; see also Goleman, *Teen-Age Risk-Taking: Rise in Deaths Prompts* (footnote continued)



Furthermore, researchers studying adolescent suicide have documented that adolescents tend not to appreciate fully the possibility, and finality, of death.<sup>13</sup> If they consider death at all, it is viewed as something that happens to elderly people, not teenagers. Many adolescents who attempt suicide may not really believe that death will occur. In fact, they may view a suicide attempt as nothing more than a form of running away, without any consideration of their own mortality.<sup>14</sup>

Adolescent cognitive development is also characterized by a high degree of egocentrism. An adolescent "assumes that other people are as obsessed with his behavior and appearance as he is himself. It is this belief that others are preoccupied with his appearance and behavior that constitutes the egocentrism of the adolescent."<sup>15</sup>

Moreover, adolescents come to regard themselves, and their own feelings, as particularly special and unique. This belief further contributes to an adolescent's lack of understanding regarding death. An adolescent's sense of specialness becomes a conviction of his or her immortality.<sup>16</sup> Adolescent egocentrism thus results in a general impairment of adolescent judgment.

Adolescence is also a period during which youths struggle to develop a certain measure of independence and personal identity or character.<sup>17</sup> An adolescent engages in this developmental task

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*New Research Effort*, N.Y. Times, Nov. 24, 1987, at C1, col. 1 ("[T]eenagers are notoriously reckless. Research suggests a combination of hormonal factors, an inability to perceive risks accurately and the need to impress peers help explain this.")

<sup>13</sup> Sheras, *Suicide in Adolescents*, in *Handbook of Clinical Child Psychology* 759, 769-70 (C. Walker & M. Roberts eds. 1983).

Adolescent suicide and suicide pacts among teenagers have become a growing national concern. See, e.g., Barron, *Suicide Rates of Teenagers: Are Their Lives Harder to Live?*, N.Y. Times, April 15, 1987, at C1, col. 5. Suicide is reported to be the third leading cause of death for teenagers. Sheras, *supra*, at 769.

<sup>14</sup> Sheras, *supra* note 13, at 769; Miller, *Adolescent Suicide: Etiology and Treatment*, in *Adolescent Psychiatry* 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981).

<sup>15</sup> Elkind, *Egocentrism in Adolescence*, 38 *Child Development* 1025, 1029-30 (1967) (emphasis in original ~~deleted~~).

<sup>16</sup> *Id.* at 1030-31.

<sup>17</sup> See generally E. Erikson, *Identity: Youth and Crisis* (1968); E. Erikson, *Childhood and Society* (1963); P. Mussen, J. Conger & J. Kagan, *supra* note 2.

in a number of ways,<sup>18</sup> such as trying out various roles, separating from his or her parents, and seeking affirmation from a peer group. Throughout this process, adolescents remain emotionally dependent on other people.<sup>19</sup> They are vulnerable to influences from both parents and peers, and are less capable of independent, self-directed action than adults. While striving to be independent, adolescents still need the guidance and support of responsible, caring adults. The character structure of adolescents, though developing, remains in flux and does not represent the final level of maturity found in adults. Adolescents are by nature capable of significant and spontaneous change.<sup>20</sup>

Normal adolescence is no longer considered necessarily a time of extreme emotional turmoil.<sup>21</sup> Adolescence is, however, generally characterized by emotionality rather than rationality. Adolescents tend to show a special intensity of feeling and tend to seek out emotional experiences. Moreover, it has been demonstrated consistently that "adolescents experience a greater fluctuation of mood than adults."<sup>22</sup>

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<sup>18</sup> It is understandable that many adolescents must struggle to develop a personal identity. In addition to the changes adolescents experience in how they think, they also undergo vast physiological and hormonal changes. Adolescents are faced with rapid increases in height, changing bodily dimensions, and physical and psychological changes related to sexual maturation. All of these changes threaten an adolescent's sense of self. See M. Lewis, *supra* note 2, at 263-66.

<sup>19</sup> "[T]he transition from childhood into adolescence is marked more by a trading of dependency on parents for dependency on peers rather than straightforward and unidimensional growth in autonomy." Steinberg & Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *Child Development* 841, 848 (1986).

<sup>20</sup> For example, young people can later overcome features of an antisocial personality that appear during adolescence. For this reason the diagnosis of antisocial personality cannot be applied until an individual has reached 18 years of age. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 342 (3d ed. rev. 1987).

<sup>21</sup> See, e.g., M. Rutter, *supra* note 2, at 235-38; Rutter, Graham, Chadwick & Yule, *Adolescent Turmoil: Fact or Fiction?*, 17 *J. Child Psychology & Psychiatry* 35 (1976); D. Offer & J. Offer, *From teenage to young manhood: a psychological study* (1975).

Daniel Offer's work has suggested that adolescents who experience the greatest inner turmoil are of lower socioeconomic status, and come from families with overt marital conflicts and a history of mental illness. See D. Offer, *The Psychological World of the Teenager* (1969).

<sup>22</sup> Hamburg & Wortman, *supra* note 2, at 11.

Finally, adolescents lack the capacity for mature, principled moral judgment which is characteristic of normal adult thought. Moral judgment emerges through the maturation process as a result of cognitive and emotional growth and an adolescent's interaction with his or her environment. An adolescent lacks a fully formed value system against which to evaluate his or her behavior and decisions. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth."<sup>23</sup>

Adolescents must undergo an array of significant changes prior to adulthood. Before these many developmental tasks are achieved, adolescents are vulnerable in a variety of ways. They have difficulty appreciating the future consequences of their acts, generally lack mature judgment, are easily influenced by family members and peers and often engage in experimentation and risk-taking. Adolescents tend to be guided by emotions rather than reason. Furthermore, adolescents lack a fully formed identity or character, and generally do not have the capacity for principled moral judgment.

Adolescence is a critical developmental stage through which young persons must pass prior to entering adulthood. The clinical literature confirms what we all generally know and what the law has always recognized — adolescents are not adults. Adolescents are less capable and less responsible than adults, and more in need of protection and support.

## II

### ADOLESCENTS WHO COMMIT MURDER SUFFER FROM SERIOUS PSYCHOLOGICAL AND FAMILY DISTURBANCES WHICH EXACERBATE THE ALREADY EXISTING VULNERABILITIES OF YOUTH

Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and

<sup>23</sup> Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 *Vita humana* 11, 30 (1963). See Rest, Davison & Robbins, *supra* note 5, at 276-77; Kohlberg & Gilligan, *supra* note 5, at 1072; Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 402 (M. Hoffman & L. Hoffman, eds. 1964).

development. It is well established that these disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.<sup>24</sup>

Psychiatrists and psychologists have learned that adolescents who commit murder frequently come from families that are extremely chaotic and fail to provide the necessary support and direction for their children.<sup>25</sup> Furthermore, adolescents who commit murder almost invariably have a family background that includes extreme physical abuse and intrafamily violence.<sup>26</sup> Many homicidal adolescents have also been sexually abused.<sup>27</sup>

These young people then are often victims of, and witnesses to, significant violence during their childhood and adolescence. The violence is often sustained, repetitive, and characterized by extraordinary brutality and sadism.<sup>28</sup> Their family environment

<sup>24</sup> See generally Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homicide: Review of 72 Cases*, *Behavioral Sciences & the Law*, Vol. 5, No. 1, at 11 (1987); Cornell, Benedek & Benedek, *Juvenile Homicide: Prior Adjustment and a Proposed Typology* (paper presented at the American Psychiatric Association Annual Meeting, Washington, D.C.) (1986); *The Aggressive Adolescent: Clinical Perspectives* (C. Keith ed. 1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

<sup>25</sup> See, e.g., Ratner, *A Case of Child Abandonment - Reflections on Criminal Responsibility in Adolescence*, 13 *Bull. Am. Acad. Psychiatry Law* 291 (1985); Haizlip, Corder & Ball, *The Adolescent Murderer*, in *The Aggressive Adolescent: Clinical Perspectives* 126, 129-34 (C. Keith ed. 1984); M. Rutter & H. Giller, *supra* note 24, at 180-91; Corder, Ball, Haizlip, Rollins & Beaumont, *Adolescent Parricide: A Comparison with Other Adolescent Murder*, 133 *Am. J. Psychiatry* 957 (1976).

<sup>26</sup> See, e.g., Haizlip, Corder & Ball, *supra* note 25, at 130-34; Straus, *Family Training in Crime and Violence*, in *Crime and the Family* 164, 183 (A. Lincoln & M. Straus eds. 1985); Sendi & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 *Am. J. Psychiatry* 423, 427 (1975); Silver, Dublin & Lourie, *Does Violence Breed Violence? Contributions from a Study of the Child Abuse Syndrome*, 126 *Am. J. Psychiatry* 404, 407 (1969).

<sup>27</sup> See, e.g., Haizlip, Corder & Ball, *supra* note 25, at 130-34; Straus, *Domestic Violence and Homicide Antecedents*, *Bull. N.Y. Acad. Med.*, Vol. 62, No. 5, at 446 (1986); Sendi & Blomgren, *supra* note 26, at 427.

<sup>28</sup> See, e.g., Lewis, Shanok, Pincus & Glaser, *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 18 *J. Am. Acad. Child Psychiatry* 307, 315-18 (1979); Sendi & Blomgren, *supra* note 26 at 427.



is one in which violence is portrayed as the ultimate problem-solver. The use of physical aggression is considered an acceptable way of dealing with others.<sup>29</sup>

This systematic exposure to violence affects a young person in a number of ways. First, violence becomes a style of behavior against which a child or adolescent is apt to model his or her own behavior. Second, the persistent abuse engenders deep-seated feelings of rage which are often acted upon against other people.<sup>30</sup> Finally, a child who is physically battered can suffer significant trauma to the brain which results in increased impulsivity and volatility.<sup>31</sup>

Adolescents who commit murder also frequently have severe cognitive limitations. They tend to be intellectually immature and educationally deficient. These adolescents have significant impairments in judgment and are unable to perceive the consequences of their actions. These cognitive limitations are often linked to learning disabilities and neurological damage. Homicidal aggression in adolescents is also strongly associated with psychiatric problems.<sup>32</sup>

Together, these factors — exposure to violence, cognitive limitations, and psychiatric and neurological problems — exacerbate

<sup>29</sup> See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Lewis, Shanok, Grant & Ritvo, *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, 140 Am. J. Psychiatry 148 (1983).

<sup>30</sup> See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Haizlip, Corder & Ball, *supra* note 25, at 130; Lewis, Shanok, Grant & Ritvo, *supra* note 29, at 152-53; Paperny & Deisher, *Maltreatment of Adolescents: The Relationship to a Predisposition Toward Violent Behavior and Delinquency*, *Adolescence*, Vol. 18, No. 71, at 499 (Fall 1983); Silver, Dublin & Lourie, *supra* note 26, at 407; see also M. Wolfgang & F. Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* 160 (1967) ("aggression is a learned response, socially facilitated and integrated").

<sup>31</sup> See, e.g., Lewis, Moy, Jackson, Aaronson, Restifo, Serra & Simos, *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 Am. J. Psychiatry 1161, 1165-66 (1985); Lewis, Shanok, Grant & Ritvo, *supra* note 29, at 152-53; Lewis, Shanok, Pincus & Glaser, *supra* note 28, at 314; Bender, *Children and Adolescents Who Have Killed*, 116 Am. J. Psychiatry 510 (1959).

<sup>32</sup> See, e.g., Lewis, Shanok, Pincus & Glaser, *supra* note 28, at 313-18.

the already existing vulnerabilities of normal adolescence. Added to a normal adolescent's generally limited ability to appreciate the consequences of his or her actions and to take into account societal values in choosing a course of action, an adolescent who kills is handicapped further by impairment in cognitive ability. Added to a normal adolescent's susceptibility to the influence of family members and peers, an adolescent who kills is surrounded by an atmosphere of violence in which the norm not only tolerates but encourages violence and trivializes its consequences. And finally, added to the emotionality and egocentrism of adolescence, an adolescent who kills is often afflicted with neuropsychiatric disorders which further heighten already intensified emotions and which can create serious misperceptions concerning the relationship between himself or herself and the external world.

#### A. A Study of Adolescents on Death Row Confirms Their Seriously Impaired Development

In the only clinical study of individuals on death row in the United States who committed capital offenses when they were under the age of 18, researchers have found that as a group these juveniles suffer from the neuropsychiatric, psychoeducational and family disturbances generally characteristic of adolescents who commit homicide (the "Study").<sup>33</sup>

The 14 subjects of this interdisciplinary study consisted of all adolescents sentenced to death in four states. They were selected for

<sup>33</sup> Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psychiatry 584 (1988) (This study was originally presented as a paper at the 34th Annual Meeting of the American Academy of Child and Adolescent Psychiatry, October 1987.)

The authors of the Study are: Dorothy Otnow Lewis, M.D., Professor of Psychiatry, New York University School of Medicine, Clinical Professor of Psychiatry, Yale University Child Study Center; Jonathan H. Pincus, M.D., Professor and Chairman of the Department of Neurology, Georgetown University; Barbara Bard, Ph.D., Professor of Special Education, Central Connecticut State University; Ellis Richardson, Ph.D., Research Associate Professor of Psychiatry, New York University School of Medicine; Leslie Prichep, Ph.D., Associate Professor of Psychiatry, New York University School of Medicine; Marilyn Feldman, M.A. in Psychology; and Catherine Yeager, M.A., Research Assistant, Department of Psychiatry, New York University School of Medicine.



the study solely on the basis of their age at the time of the capital offense. They are therefore reasonably believed to be representative of the adolescent offender death row population as a whole.<sup>34</sup>

The subjects were given comprehensive psychiatric, psychological, neurological, educational and electroencephalographic examinations. The psychiatric examination consisted of a thorough interview covering topics such as medical history, history of neuropsychiatric symptoms, and family and social history, including history of physical and sexual abuse. Careful mental status examinations<sup>35</sup> were performed, and detailed neurological histories were obtained by a psychiatrist and a neurologist. Additionally, any historical evidence of central nervous system trauma was corroborated through physical examinations, record reviews, and specialized tests such as the electroencephalogram. Finally, a standard neurological examination was conducted and a battery of psychological, neuropsychological, and educational tests was administered.<sup>36</sup>

The Study found serious and wide-ranging disturbances in *all* of the subjects. All 14 suffered head injuries during childhood, nine of the injuries were severe enough to result in hospitalization, indentation of the cranium, or loss of consciousness. Furthermore, the neurological and electroencephalographic data revealed that nine of the subjects had serious neurological abnormalities, including evidence of brain injury and electroencephalographic findings suggestive of a previously undiagnosed seizure disorder.<sup>37</sup>

The Study also found that seven of the subjects were psychotic at the time of their evaluations and/or had been so diagnosed in earlier childhood. An additional four subjects displayed histories consistent with severe mood disorders. The three remaining subjects suffered from disturbed thinking, characterized by periodic

<sup>34</sup> *Id.* at 585.

<sup>35</sup> The mental status examination is a cross-sectional inventory of a patient's current behavior, symptoms, sensorium, and cognitive faculties. See Ginsberg, *Psychiatric History and Mental Status Examination*, in 1 *Comprehensive Textbook of Psychiatry* 487 (H. Kaplan & B. Sadock 4th ed. 1985).

<sup>36</sup> Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 585.

<sup>37</sup> *Id.*

paranoia. Thus, all 14 exhibited psychiatric disturbances. Seven suffered from psychiatric disturbances that first appeared in early or middle childhood.<sup>38</sup> In all cases, psychopathology antedated the crimes for which the subjects were sentenced to death.<sup>39</sup>

The psychoeducational testing done in the Study further indicates that at least nine of the subjects experienced significant brain impairment and lacked the ability to formulate abstract concepts. Moreover, 12 subjects had I.Q. scores below 90.<sup>40</sup> The Study concludes that the majority of these individuals have serious deficiencies in abstract reasoning and function well below the expected levels for their ages.<sup>41</sup>

The Study reveals that these adolescent offenders had been repeatedly and brutally physically and sexually abused, often by more than one family member. Furthermore, alcoholism, drug abuse, psychiatric treatment and psychiatric hospitalization were prevalent in the histories of their parents.<sup>42</sup>

The Study concludes that individuals condemned to death in the United States for crimes committed in their youth are multi-handicapped. They generally have suffered serious central nervous system injuries, have suffered since early childhood from psychotic symptoms, and have been physically and sexually abused. These significant disturbances inhibit natural development, exacerbate the existing vulnerabilities of youth, and contribute to the violent behavior demonstrated by these adolescents.<sup>43</sup>

Furthermore, the physical and sexual abuse experienced by these adolescents contributes to their crimes. First, the multiple batterings suffered by these adolescents may have actually caused brain

<sup>38</sup> *Id.*

<sup>39</sup> Psychopathology refers to "disordered psychologic and behavioral functioning (as in a mental disease)." Webster's Third New International Dictionary 1833 (1968).

<sup>40</sup> An I.Q. score of 100 is considered average. A person with an I.Q. score below 90 falls into the bottom twenty-five percent of other individuals of the same age in the United States. See D. Wechsler, *The Wechsler Intelligence Scale for Children - Revised* 25 (1974); D. Wechsler, *The Wechsler Adult Intelligence Scale - Revised Manual* 27 (1980).

<sup>41</sup> Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 585-86.

<sup>42</sup> *Id.* at 586-87.

<sup>43</sup> *Id.* at 587-88.

injury which would result in increased impulsivity and volatility. Second, the severe parental violence that they experienced functioned as a model for their behavior. Third, the extreme, irrational brutality to which these adolescents were exposed engendered rage which was displaced onto other individuals in their environment.<sup>44</sup>

Finally, the Study suggests that the multiple disturbances which contributed to the violent behavior that these adolescents displayed also contributed to the harshness of the sentences they received. According to the Study, these adolescents uniformly tried to hide evidence of their cognitive deficits and psychotic symptomatology.<sup>45</sup> Also, both they, and often their attorneys, tried to conceal or minimize their parents' brutality towards them.<sup>46</sup> It is ironic that the very factors which could function as mitigating circumstances instead remain hidden at the time of the sentencing. It is noteworthy that much of the clinical information revealed in this Study had apparently not been previously uncovered during the course of each individual adolescent's case. The Study reports that of these 14 subjects "in only five cases were any pretrial evaluations performed at all. These tended to be perfunctory and provided inadequate and inaccurate information regarding the adolescents' neuropsychiatric and cognitive functioning."<sup>47</sup> In sum, the clinical and legal services necessary to uncover and respond to the significant medical, psychological and social abnormalities suffered by adolescents on death row are simply unavailable.<sup>48</sup>

#### B. Both Petitioners Exhibit the Same Characteristics as the Subjects of the Adolescent Death Row Study

Petitioner Heath Allen Wilkins is an extremely disturbed young person who has spent much of his life in various mental institutions.<sup>49</sup>

<sup>44</sup> See *supra* notes 30-31 and accompanying text.

<sup>45</sup> Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 587-88.

<sup>46</sup> *Id.* at 588.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 589.

<sup>49</sup> It is very rare for a child to be psychiatrically hospitalized or placed in a residential treatment facility. For example, the National Institute of Mental Health reports that in 1980 only approximately 1 child in 1,000 was psychiatrically hospitalized and only approximately 3 children in 10,000 received residential treatment. NIMH, *Mental Health, United States* Pub. No. 85-1378 (C.A. Taube & S.A. Barrett eds. 1985).

(footnote continued)

(W.J.A. at 39-45; W. Tr. at 249-50.)<sup>50</sup> He has suffered from serious psychiatric and emotional disorders since early childhood. (W.J.A. at 68; W. Tr. at 272.) The record establishes that Heath has exhibited psychotic symptoms and bizarre behaviors throughout his adolescence and childhood. (W.J.A. at 43, 68; W. Tr. at 235.) His thinking has frequently been described as illogical, confused and paranoid. (W.J.A. at 40, 43, 47, 60, 61, 68.)<sup>51</sup> Heath has been described as "borderline" or "schizotypal," and has been "diagnosed as suffering from schizophrenia." (W.J.A. at 40, 43, 50, 67-68.) Furthermore, Heath has required treatment with antipsychotic medications. (W.J.A. at 43, 59, 67.) In addition, Heath has suffered from severe depression since he was at least nine years old, leading him to make numerous suicide attempts. (W.J.A. at 46, 60; W. Tr. at 265.)

Heath's uncle introduced him to drugs while he was still in kindergarten. (W.J.A. at 29, 57; W. Tr. at 261.) Heath has abused alcohol and various drugs, including "gasoline, glue, pot, uppers and downers," since age five or six. (W.J.A. at 67.) In addition, he has used LSD quite frequently since age 10. (W.J.A. at 67.) Heath's history of severe drug abuse could only have exacerbated his deep-seated problems. Furthermore, the record indicates that Heath's drug abuse may very well have caused him to suffer serious neurological damage. (W.J.A. at 29.)

Both Heath's brother and his father also have a history of psychiatric illness. Heath's father was committed to a mental institution. (W.J.A. at 41.) His brother was also psychiatrically hospitalized and diagnosed as schizophrenic. (W.J.A. at 61.)<sup>52</sup>

These forms of treatment are reserved for the most disturbed children in our society. Heath's extended institutionalization in such facilities demonstrates the severity with which his symptoms were regarded.

<sup>50</sup> References preceded by "W.J.A." are to the Wilkins Joint Appendix. References preceded by "W. Tr." are to the Wilkins trial transcript.

<sup>51</sup> There is also evidence in the record that Heath experienced auditory and visual hallucinations (W.J.A. at 30.).

<sup>52</sup> Severe mental illness in first degree relatives is significant because such psychotic disorders as schizophrenia tend to run in families and vulnerabilities to them are thought to be inherited. Weiner, *Schizophrenia: Etiology*, in 1 *Comprehensive Textbook of Psychiatry* 653, 655 (H. Kaplan & B. Sadock 4th ed. 1985). In fact, Heath's psychiatric records suggest that his illness may have a genetic component. (W.J.A. at 47.)



Heath's family environment was very chaotic, disturbed and destructive. His father left the family when Heath was very young. According to records, Heath's father was violent and abusive in the family. (W.J.A. at 41.) Heath was also abused by his mother and his mother's boyfriend. Heath's mother sometimes had violent outbursts that led her to beat Heath for two hours at a time. (W.J.A. at 28, 57; W. Tr. at 261.) Heath was also sexually abused. (W.J.A. at 31; W. Tr. at 261.) Heath's family was so lacking in support that in the weeks preceding the crime for which he was sentenced to death he was not allowed in the house by his mother and was essentially homeless and without any kind of adult support. (W. Tr. at 272.)

Thus, Heath has been exposed to a constellation of psychological, physical and environmental disturbances which have disrupted his natural growth and development. He has suffered from profound psychiatric, emotional and social limitations. Furthermore, Heath has been a victim of extreme abuse and neglect.<sup>53</sup> He is typical in every way of adolescents on death row as a group.<sup>54</sup> Under these circumstances, it shocks the conscience that Heath was permitted to waive counsel, represent himself and seek the death penalty. The death penalty in this case "only serves to bury and cover up the failures of our existing social and penal programs." *State v. Wilkins*, 736 S.W.2d 409, 423 (Mo. banc 1987) (Welliver, J. dissenting).

Petitioner Jose Martinez High also is similar to the adolescents on death row studied by Dr. Lewis and her colleagues.<sup>55</sup> Jose had apparently functioned adequately until the tenth grade when he suddenly failed everything. (H.H.C. Tr. at 57.)<sup>56</sup> He became possessed by certain fantasies, developed disciplinary problems and "seemed alienated from the entire adult world." (H.H.C. Tr. at 42, 58.) One of his teachers stated that "Jose may well have been profoundly and emotionally disturbed . . . with deeper problems than 95% of our students . . . [He] was desperate for

<sup>53</sup> See *supra* notes 24-32 and accompanying text.

<sup>54</sup> Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 588-89.

<sup>55</sup> *Id.*

<sup>56</sup> References preceded by "H.H.C. Tr." refer to the High State Habeas Corpus Transcript.

attention and definitely begging for psychological counseling." (H.H.C. Tr. at 60.) This dramatic change in Jose's behavior, as well as the observations of his teachers, suggest the onset of a psychiatric illness. Unfortunately no one was available to help Jose with his problems. (H.H.C. Tr. at 60.)

Within a mere two years of the onset of these psychological problems Jose committed the crime for which he has been sentenced to death. Jose has apparently never been afforded a comprehensive psychiatric and neurological evaluation. Without such an examination we do not know how closely Jose resembles the increasingly clear picture of death row inmates who committed capital crimes in their adolescence. Based on the limited record, however, and the nearly universal characteristics found in the juvenile death row study, *amici* believe that a complete and thorough examination of Jose High would likely reveal the same psychological, educational and environmental disturbances found in adolescents on death row as a group.<sup>57</sup>

### III

#### THE EXECUTION OF AN INDIVIDUAL WHO WAS UNDER AGE 18 AT THE TIME OF THE CAPITAL OFFENSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

The Eighth Amendment, which applies to the states through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This Court has determined that a punishment is "cruel and unusual" if it is excessive. *Weems v. United States*, 217 U.S. 349 (1910). It is excessive if it is disproportionate to the crime or to the individual's moral culpability for that crime, or if it makes no measurable contribution to acceptable goals of punishment. *Enmund v. Florida*, 458 U.S. 782, 800 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). A punishment is also impermissible if it offends society's "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

<sup>57</sup> Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, *supra* note 33, at 588-89.



(plurality opinion); *Thompson v. Oklahoma*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 2687, 2691 (1988) (plurality opinion).

Although the Court has determined that the death penalty is not inherently cruel in violation of the Eighth Amendment, *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), it has recognized the extraordinary nature of the punishment:

[E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

*Spaziano v. Florida*, 468 U.S. 447 (1984) (Stevens, Brennan and Marshall, JJ., concurring in part and dissenting in part) (collecting cases); see also *California v. Ramos*, 463 U.S. 992, 998-99 at n.9 (1983) (collecting cases). Indeed,

[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).

The question raised herein is whether death is *ever* an appropriate punishment for an individual who was under the age of 18 at the time he or she committed a capital offense. The answer to this question must be *no*. The fundamental differences between adolescence and adulthood, distinctions universally recognized by the medical and social sciences, as well as the law, make this irrevocable form of punishment both excessive as applied to youths and offensive to contemporary standards of decency.

In determining whether the death penalty is a permissible punishment for a particular category of offenders, this Court must

consider the available objective indicators of contemporary standards of decency, such as legislative enactments and jury determinations. The analysis, however, does not stop there. This Court has consistently observed that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Thompson v. Oklahoma*, 108 S. Ct. at 2692 n.8 (plurality opinion) (quoting *Coker v. Georgia*, 433 U.S. at 597). See also *Enmund v. Florida*, 458 U.S. at 797. In exercising that judgment here, this Court first must ask whether adolescents are sufficiently morally culpable to suffer the penalty of death, and then consider whether the application of the death penalty to adolescents measurably contributes to the social purposes ostensibly served by the death penalty. *Thompson v. Oklahoma*, 108 S. Ct. 2692 (plurality opinion). The answers to these two questions are informed by the teachings of psychiatrists, psychologists and other adolescent development experts. This Court must bring this body of knowledge to bear as it makes its own considered judgment regarding the constitutionality of capital punishment for adolescents.

#### A. Capital Punishment Is Cruel and Unusual As Applied to Adolescents Because Adolescents Lack the Requisite Moral Culpability

This Court has repeatedly recognized that the appropriateness of the death penalty depends upon the moral culpability of the offender or category of offenders. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion); *California v. Brown*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 837, 840 (1987) (O'Connor, J., concurring) ("punishment should be directly related to the personal culpability of the criminal defendant"); *Tison v. Arizona*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 1676, 1683 (1987). The vast body of clinical research and literature demonstrates that adolescents lack the experience, judgment, psychological development, and fully formed character of adults. Thus, adolescents cannot be equated with adults with respect to their eligibility for the death penalty. Capital punishment for adolescents is cruel and unusual because it is grossly out of proportion to adolescents' moral culpability.

The fact that a separate system of criminal justice has evolved for adolescents is ample evidence that the death penalty, as applied to adolescents, is disproportionate.

The very existence of a dual criminal justice system is evidence of a two-fold societal judgment that children do not bear the same degree of responsibility for their antisocial behavior as adults and therefore should not be subject to the harsh penalties of criminal trial and penal incarceration; and juvenile delinquents are, by virtue of their youth, responsive to rehabilitative treatment.<sup>58</sup>

Inherent in the law are the basic beliefs that (i) youths should not be punished as severely as adults because they are not as culpable as adults for their offenses; and (ii) youths by nature are receptive to treatment and rehabilitation.

The disparate treatment of youth in the law is fully supported by the clinical evidence about adolescent development. As described in Point I, adolescents are still growing socially and psychologically. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion). Furthermore,

adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.<sup>59</sup>

<sup>58</sup> S. Fox, *The Juvenile Court: Its Context, Problems and Opportunities* 11-13 (1967).

<sup>59</sup> *Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime* 47 (1978). ("Task Force")

Thus, execution must be regarded as a disproportionate form of punishment as applied to adolescents. Their diminished responsibility for their acts justifies the added measure of tolerance that exists in the law. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion) ("[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."). Because adolescents are not expected to conform their behavior to adult standards, it is inappropriate to inflict on them a form of punishment intended only for society's most serious and incorrigible offenders. The ability of adolescents to adjust and improve as they mature further demonstrates the inappropriateness of inflicting on adolescents the ultimate punitive sanction of death.

#### B. Capital Punishment Is Cruel and Unusual As Applied to Adolescents Because It Serves No Legitimate Penological Purpose

The death penalty ostensibly serves two acceptable goals of punishment: deterrence and retribution. *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion); *Gregg v. Georgia*, 428 U.S. at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.). Because inflicting the death penalty on youthful offenders makes no measurable contribution to either goal, its application to them is cruel and unusual punishment, "nothing more than the purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. at 592 (plurality opinion).

##### 1. The Death Penalty Does Not Deter Adolescents From Committing Capital Offenses

In commenting upon the lack of empirical evidence to support or rebut the theory that capital punishment has a deterrent effect, Justice Stewart observed:

We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.



*Gregg v. Georgia*, 428 U.S. at 185-86 (joint opinion of Stewart, Powell, and Stevens, JJ.). In light of what is known today about adolescent development generally and the development of adolescents who commit homicide in particular, adolescents are unlikely to engage in a meaningful "cold calculus that precedes the decision" to commit a capital offense in which "the possible penalty of death" enters into their decision-making process.

As described above, adolescents generally are more impulsive and less able to appreciate the consequences of their acts than adults. Adolescents also tend to lack a fully developed appreciation of death and its finality. Moreover, while adolescents may be capable of rational decision-making in some areas with the guidance and support of adults, this capacity is significantly lessened when they are placed under highly stressful circumstances.<sup>60</sup>

Such circumstances are abundant with respect to homicidal adolescents. These adolescents typically grow up in a chaotic family environment, are exposed to violence and abuse throughout their childhood, and tend to be impeded in their natural development by the adults upon whom they must rely for protection and support. They also suffer from cognitive limitations which further impair their ability to make sound judgments. These factors are particularly damaging during adolescence because it is at this stage of development that human beings are especially vulnerable and awkward. While adolescents may look like and possess many of the physical attributes of adults, they do not yet think or behave like adults. The violent nature of adolescents who kill is a predictable consequence of the combination of (i) their incomplete human development which has been further hindered by an unstable and violent childhood, and (ii) the rapid physical changes which they are undergoing.

It is thus demonstrably wrong to conclude that the death penalty deters adolescents who commit capital offenses. Adolescents

<sup>60</sup> In sum, although some youths' involvement in delinquency may be related to cost-benefit decisions and to a rational process, other explanations better explain the delinquent behavior of most youths. With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process. C. Bartollas, *Juvenile Delinquency* 102 (1985); see also P. Hahn, *The Juvenile Offender and the Law* 40-57 (2d ed. 1978) (free will and rational choice not among various behavioral theories explaining the causes of delinquency).

generally do not engage in any "cold calculus" that would factor in the possibility of a death sentence before they act homicidally. *Thompson v. Oklahoma*, 108 S. Ct. at 2700 (plurality opinion) ("The likelihood that the teenage offender has made the kind of cost/benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."). Emotionality, coupled with a pronounced inability to appreciate or be affected by the knowledge of the consequences of their actions, leads adolescents to commit capital offenses. Free will and rational calculation are generally absent in these circumstances.

## 2. Retribution Is Not a Legitimate Penological Purpose With Respect to Adolescents

The penological goal of retribution has two components: (1) the desire that offenders suffer the punishment they deserve, and (2) the desire for vengeance. See *Gregg v. Georgia*, 428 U.S. at 183-184 (joint opinion of Stewart, Powell, and Stevens, JJ.). Whether these concerns are satisfied is again contingent upon the degree of the offender's responsibility for the offense. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 107 S. Ct. at 1683. "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion), the retribution rationale is simply inapplicable to the execution of adolescents.

Adolescents, like adults, should pay for their crimes. However, "[t]he juvenile justice system, while holding minors responsible for their misconduct . . . acknowledges that the level of juvenile responsibility is lower than for adults."<sup>61</sup> It is thus excessive to inflict the penalty of death on adolescents.

Neither of the concerns of retribution is satisfied by executing youthful offenders. The punishment of death is too severe because adolescents are not as responsible as adults. In addition, the disparate legal treatment of adolescents is ample evidence that society is less vengeful with respect to youthful offenders.

Retribution is also contrary to the principal legitimate purpose of punishing the young: rehabilitation. Traditional methods of

<sup>61</sup> Task Force at 47.



punishing youthful offenders are based upon a presumption that young persons are more amenable to positive change than adults. In fact, this presumption is well-documented. Consequently, the finality and irrevocability of the death penalty makes such punishment manifestly inappropriate for adolescents.

a. Adolescents Are Less Responsible Than Adults For Their Offensive Acts

Adolescents are developmentally different from adults in ways that diminish their level of responsibility for their actions. Point I documents the inexperience, impulsiveness and emotionality of youth. Adolescents have a greater tendency than adults to act in disregard of the potentially serious and harmful consequences of their acts. Even when they are aware of such consequences, they are more prone than adults to act in spite of them.

[T]he American adolescent, struggling with the biological and psychological pressures of youth, seeks status and reassurance in the company of his peers. Rebellion against parental authority and restrictions is combined with pressure to conform to the expectations of other adolescents. The teen years are a period of experiment, risk taking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures.<sup>62</sup>

This Court has taken note of these developmental distinctions, observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. at 635. See *Thompson v. Oklahoma*, 108 S. Ct. at 2699 (plurality opinion). This fundamental concept of youth forms the basis for state laws which commonly prohibit minors from possessing alcohol in public, from voting, from sitting on a jury, and from marrying without parental consent.

[T]he experience of mankind, as well as the long history of our law, recognize[s] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

*Goss v. Lopez*, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original). It also justifies disparate treatment for

<sup>62</sup> *Id.* at 3.

adolescents under the First,<sup>63</sup> Fourth,<sup>64</sup> and Fourteenth<sup>65</sup> Amendments. This same concept of youth also warrants less severe punishment. See *supra* at 20-21.

Furthermore, as shown in Point II, adolescents who commit capital offenses are even less responsible for their acts than adolescents generally. Such adolescents tend to lack the support and protection ordinarily provided youths by parents and other family members. In addition, their families are frequently violent and abusive. These factors are further aggravated by psychiatric problems from which homicidal adolescents frequently suffer. As a result of these factors, the natural maturation process is seriously inhibited. The emotional growth and development of adolescents who are homicidal is, in effect, stunted.

The death penalty is thus too severe a punishment for adolescent offenders. Because an adolescent has not yet fully developed emotionally and psychologically, and because an adolescent who commits a capital offense tends to be even more developmentally limited, the execution of such an individual is by definition a greater punishment than he or she deserves.

<sup>63</sup> *E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (state law forbidding sale of sexually explicit but non-obscene material to persons under 17 years of age does not violate First Amendment because "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,' ") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

<sup>64</sup> *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (schoolchild's Fourth Amendment right against unreasonable search and seizure and his legitimate expectation of privacy must give way to school's legitimate need to maintain appropriate educational environment).

<sup>65</sup> *E.g.*, *Schall v. Martin*, 467 U.S. 253 (1984) (state law authorizing preventative detention of accused juvenile delinquents does not violate their Fourteenth Amendment rights if serious risk of subsequent crime exists, because, although juveniles' liberty interest is strong under Fourteenth Amendment, juveniles, unlike adults, require some form of custody).

Notably, in *Schall* the Court observed:

Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae*" interest in preserving and promoting the welfare of the child."

*Id.*, at 265 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

b. Vengeance Is Antithetical to the Lawful Treatment of Adolescents

Society's moral obligation to protect its young is indisputable. As Justice Frankfurter observed in *May v. Anderson*, 345 U.S. 528, 536 (1953) (concurring opinion): "Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Youth and its inherent characteristics — immaturity, vulnerability, inexperience and dependency — place the concept of revenge at odds with the lawful treatment of the young. Thus,

[t]he spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.<sup>66</sup>

As described *supra* at 24, youths are defined as less responsible for their acts by state legislatures and the courts. In addition to a host of both legislatively and judicially imposed restraints on the rights and liberties of adolescents, both state and federal laws provide distinct rules and procedures for the prosecution of youths. Under both state and federal law, many acts which constitute crimes if committed by adults instead constitute acts of "juvenile delinquency" if committed by adolescents. See, e.g., *State In Interest of D.B.S.*, 137 N.J. Super. 371, 349 A.2d 105 (1975).

Society's responsibility to protect and nurture the young is also well supported by legal precedent. This obligation is perhaps best reflected in the Court's longstanding recognition of the guiding role parents play in the upbringing of children.<sup>67</sup> In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that although a state's interest in compulsory education for its children is indeed strong, it must give way to parents' "traditional interest" in raising children. *Id.*

<sup>66</sup> Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613, 637 (1983).

<sup>67</sup> Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. at 166.

at 214. Similarly, when it comes to deciding whether a child is to be committed to a state mental hospital, the Court has stated that it is up to the parents to decide, notwithstanding the child's clear "liberty interest" not to be confined without due process.

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. . . . *Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.*

*Parham v. J.R.*, 442 U.S. 584, 602-603 (1979) (emphasis supplied).

Vengeance cannot therefore serve as a legitimate penological goal with respect to adolescents — even adolescents who commit capital offenses. The diminished culpability of adolescents, coupled with society's obligation to protect the young, warrants a measure of constitutionally imposed tolerance sufficient to bar their execution.

c. Retribution Is Contrary to Rehabilitation, the Principal Legitimate Goal of Punishing Adolescents

Retribution is contrary to rehabilitation, which is the primary goal of punishing the young. E.g., *In the Matter of the Appeal in Maricopa County, Juvenile Action No. J-84536-S*, 126 Ariz. 546, 617 P.2d 54, 56 (1979) ("the most deeply rooted concept in juvenile court philosophy is that the purpose of the system is to rehabilitate and not to punish"); *Rust v. Alaska*, 582 P.2d 134 (Alaska 1978) (express purpose of juvenile jurisdiction is rehabilitation rather than punishment). The reason for this objective is not hard to discern: "[I]ncorrigibility is inconsistent with youth . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

The existence of a juvenile justice system under both state and federal law which treats youthful offenders more leniently than adults demonstrates the importance society places on the goal of rehabilitation with respect to adolescents.<sup>68</sup> For example, the purpose

<sup>68</sup> See generally A. Platt, *The Child Savers: The Invention of Delinquency* (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909).



of the Federal Juvenile Delinquency Act, 18 U.S.C §§ 5031-5042 (West 1985), "is to be helpful and rehabilitative rather than punitive . . ." *United States v. Hill*, 538 F.2d 1072, 1074 (4th Cir. 1976). Under the Act, "a juvenile is accorded preferential and protective handling not available to adults accused of committing crimes." *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir.), cert. denied, 449 U.S. 987 (1980).

Greater tolerance toward youthful offenders is justified by their heightened capacity for change, growth and improved behavior. As described *supra* at 7, adolescents are generally more receptive and responsive to rehabilitative treatment. More specifically, "juvenile murderers tend to be model prisoners and exhibit a very low rate of recidivism when released."<sup>90</sup> Putting adolescents to death is therefore without any legitimate penological justification.

### C. The Execution of Adolescents Is Unconstitutional in Light of Contemporary Human Knowledge About Adolescents Generally and Adolescents Who Commit Capital Offenses in Particular

This Court has consistently recognized that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on a particular category of offenders. *Thompson v. Oklahoma*, 108 S. Ct. at 2698 (plurality opinion) (quoting *Enmund v. Florida*, 458 U.S. at 797). The "broad, vague terms [of the Eighth Amendment] do not yield to a mechanical parsing . . ." *Thompson v. Oklahoma*, 108 S. Ct. at 2698 n.40 (plurality opinion).

Thus, Eighth Amendment analysis is "flexible and dynamic." *Gregg v. Georgia*, 428 U.S. at 171 (joint opinion of Stewart, Powell, and Stevens, JJ.). Whether the infliction of a particular punishment is inherently cruel and unusual is subject to periodic review, which must give due consideration to "contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962). Contemporary human knowledge respecting adolescent development generally and the nature of adolescents who commit capital offenses in particular indicates that the ultimate sanction of death is an inappropriate form of punishment for such persons for the reasons described herein.

<sup>90</sup> Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Cleve. St. L. Rev. 363, 395 (1987) (citing Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 De Paul L. Rev. 23, 32-34 (1976)); D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, *The Violent Few* 52 (1978); T. Sellin, *The Penalty of Death* 102-20 (1982).

The developmental differences between adolescents and adults are alone sufficient to justify a constitutional ban on the execution of individuals who commit capital offenses while under the age of 18. It is offensive to contemporary standards of decency to commit to death individuals who, because of their lack of maturity, exist in the law as persons who are incapable of making legally binding decisions in certain matters and who are often accorded disparate treatment for acts which would be regarded as criminal if they were adults. The reason for these distinctions is clear: Youths "cannot be judged by the more exacting standards of maturity." *Haley v. Ohio*, 332 U.S. 596, 599 (1948). These same distinctions justify a degree of leniency in the manner in which adolescents who commit capital offenses are punished. The ultimate punitive sanction of death is just too harsh.

However, the analysis need not end there. As shown in Point II, youths who commit capital offenses typically suffer from a variety of serious natural and environmental disabilities. In addition to exhibiting all of the attributes which make youths vulnerable by nature, adolescents who kill are deficient intellectually, emotionally, psychologically and frequently neurologically. Their impairment is aggravated by parents or legal guardians who fail to provide much needed support at a critical stage in their lives, and indeed, who typically provide negative influences. The individuals on death row who were minors when they committed capital offenses exhibit these deficiencies.<sup>91</sup>

The execution of persons who commit homicide while under the age of 18 is therefore far more offensive as actually applied than it is in the abstract as applied to the universe of adolescents. The commission of a homicide by an adolescent is a reflection of a multitude of serious and complex problems from which the adolescent suffers. Such youths almost invariably have been deprived of a stable, healthy environment in which to develop. Nor could they rely upon adults to exercise rational judgment on their behalf. Most significantly, however, the law has provided them little practical recourse. Adolescents who commit homicide are legally subject to the will of and reliant upon adults who typically contribute substantially to the adolescents' impairment.

<sup>91</sup> It is no response to say that all these factors are considerations that can be introduced as mitigating evidence at the penalty phase of a capital trial under *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. Clearly *Lockett* was an insufficient check inasmuch as these individuals were sentenced to death despite their substantial impairment.



The most fundamental concepts of fairness are thus implicated by the execution of persons who have committed homicide in their adolescence. They lack not only the maturity necessary to be accorded the full panoply of civil rights and liberties afforded adults, but also the protective support and guidance from responsible adults who are legally authorized to impose their will upon them. The death penalty should not therefore be inflicted on adolescents because it is cruel and unusual punishment and excessive as applied to them.

### CONCLUSION

The execution of individuals who committed capital offenses while under the age of 18 is inherently cruel and unusual in violation of the Eighth Amendment. Therefore, this Court should vacate petitioners' death sentences, and remand their cases for the imposition of life sentences.

Respectfully submitted,

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**Supreme Court of the United States**

OCTOBER TERM, 1988

Supreme Court, U.S.

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JOSEPH P. SPANGL, JR.

CLERK

JOSE MARTINEZ HIGH,

*Petitioner,*

vs.

WALTER ZANT, Warden,

*Respondent.*

HEATH A. WILKINS,

*Petitioner,*

vs.

STATE OF MISSOURI,

*Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT  
AND TO THE SUPREME COURT OF THE STATE OF MISSOURI

**BRIEF OF THE NATIONAL LEGAL AID AND  
DEFENDER ASSOCIATION AND THE NATIONAL  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST OF AMICI CURIAE<sup>1</sup>

The National Legal Aid and Defender Association (NLADA) is a non-profit organization with a membership of 2,300 legal aid and defender offices employing approximately 25,000 professionals, and, in addition, over 1,000 individual members. NLADA's primary purpose is to assist in providing effective legal services to persons, including juveniles, unable to retain counsel in criminal and civil proceedings.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers, including representatives of every state. NACDL was founded over

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<sup>1</sup> This brief is filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the Court.



twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual and human rights and the improvement of the criminal laws, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment to the United States Constitution. Additionally, NACDL has long been concerned with the

treatment of juveniles by the criminal justice system. Therefore, NACDL is very concerned about these cases, which involve the question of whether the Eighth Amendment permits persons under the age of eighteen to be sentenced to death.

#### SUMMARY OF ARGUMENT

This case presents the question of whether the Eighth Amendment prohibits the execution of persons under the age of eighteen. This Court's prior decisions interpreting the Eighth Amendment's ban against cruel and unusual punishment establish that the Court cannot determine whether a particular punishment violates "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), merely by examining statutory provisions and jury verdicts. Rather, in the final analysis, this Court

must exercise its own independent judgment in order to determine whether we may sentence our children to death.

In utilizing its independent and informed judgment, the Court must consider the lessened moral responsibility that is inherent in adolescents. Because the moral culpability of persons under the age of eighteen is intrinsically less than that of adults, capital punishment serves no legitimate penological interest when imposed upon them; the state's interests in retribution and deterrence are not furthered by the execution of teenagers. Thus the death penalty is an excessive punishment for persons under the age of eighteen, and this ultimate sanction is no longer compatible with our society's evolving standards of decency when applied to such young offenders.

## ARGUMENT

I. IN THE FINAL ANALYSIS THIS COURT MUST RELY UPON ITS OWN INFORMED JUDGMENT IN DETERMINING THE CONSTITUTIONALITY OF THE DEATH PENALTY FOR JUVENILES.

The Eighth Amendment prohibits the infliction of any punishment which is "cruel and unusual."<sup>2</sup> Although this Court has determined that the death penalty is not cruel and unusual punishment per se, Gregg v. Georgia, 428 U.S. 153 (1976), it

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<sup>2</sup> In construing the Eighth Amendment's prohibition against cruel and unusual punishment, this Court has determined that a punishment is "cruel and unusual" if it is excessive. Weems v. United States, 217 U.S. 349 (1910). An excessive punishment is one which is disproportionate to the crime, or which makes no measurable contribution to any acceptable goal of criminal punishment. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 173 (1976). A punishment is also constitutionally impermissible if it offends the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Ford v. Wainwright, 477 U.S. 399, 406 (1986); Enmund v. Florida, 458 U.S. 782 (1982).

has held that the death penalty violates the Eighth Amendment when imposed, under any circumstances, upon certain categories of offenders, see Ford v. Wainwright, 477 U.S. 399 (1986) (Eighth Amendment prohibits execution of the currently insane), or for certain categories of offenses, see Enmund v. Florida, 458 U.S. 782 (1982) (Eighth Amendment prohibits capital punishment for felony-murder where offender did not personally kill or intend that lethal force be used); Coker v. Georgia, 433 U.S. 584 (1977) (Eighth Amendment prohibits capital punishment for crime of rape of adult woman).

In deciding whether the death penalty is a permissible punishment for either a particular category of offenders or for a particular offense, the Court has examined what objective evidence is available that reflects whether the punishment is

compatible with our society's evolving standards of decency. However, the Court has consistently recognized that in the final analysis it must determine whether the Eighth Amendment tolerates a particular sentencing practice. Thus in Coker v. Georgia, 433 U.S. at 597, the Court stated: "[R]ecent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy [over the death penalty for rape], for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." The essentially independent nature of the Court's judgment was reaffirmed in Enmund v. Florida, 458 U.S. at 797<sup>3</sup>: "Although the

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<sup>3</sup> See also Thompson v. Oklahoma, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2687, 2692, n.8 (1988) (quoting Coker for the proposition



judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty [upon the particular category of offenders in question]."

In examining whether the death penalty for juveniles under the age of sixteen was an unconstitutionally excessive punishment, see Thompson v. Oklahoma, \_\_U.S.\_\_\_\_, 108 S.Ct. 2687 (1988), the Court focused primarily upon certain available objective criteria, such as legislative enactments and jury verdicts. The plurality concluded, based upon a review of the relevant statutory provi-

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that the Supreme Court's own judgment must ultimately be used in the interpretation of the Eighth Amendment); see generally Robinson v. California, 370 U.S. 660 (1962) (Court relied on its independent judgment in determining that Eighth Amendment did not permit criminalization of drug addiction).

sions and jury verdicts, that the imposition of the death penalty upon those under sixteen violated the Eighth Amendment. See Thompson, 108 S.Ct. at 2692-98. Justice O'Connor suggested that more input from state legislatures was necessary, 108 S.Ct. at 2706-11, while the dissenters were convinced that there was no constitutional violation, 108 S.Ct. at 2711-27. Amici agree that an examination of the particular objective indicia of societal consensus relied upon by the plurality in Thompson is informative. However, the question of whether the Eighth Amendment sanctions capital punishment for minors--for those under the age of eighteen--cannot be reduced to a statistical exercise.

In Coker v. Georgia, for example, the Court examined objective measures of societal practice relating to the execu-

tion of persons convicted of rape. While finding that those measures pointed to a consensus that the death penalty was an excessive punishment for the crime of rape,<sup>4</sup> the majority went on to conduct its own, separate analysis--an analysis which "requires the exercise of judgment, not the reliance upon personal preferences." Trop v. Dulles, 356 U.S. at 103 (holding unconstitutional punishment of desertion through loss of citizenship). A similar analysis must be made by the Court in determining the constitutionality of capitally punishing children under the age of eighteen. Thus although measures such as legislative actions, jury verdicts,<sup>5</sup>

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<sup>4</sup> See Coker, 433 U.S. at 591-97.

<sup>5</sup> Although jury verdicts are generally considered to be a reflection of contemporary community standards, juries in capital cases do not reflect the whole array of opinion within any community. The process of death-qualification, which the Court has allowed for state's

and public opinion polls, are indicators of our societal standards, they do not determine the constitutional question presented. This Court must ultimately bring its own judgment to bear in determining whether our evolving standards of decency endorse the execution of those under the age of eighteen.

The Eighth Amendment was drafted by the framers with the clear understanding that this Court would shoulder the burden of authoritatively determining the

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enforcement of their capital statutes, see Lockhart v. McCree, 476 U.S. 162 (1986), unquestionably eliminates from juries all those who cannot consider the use of death as punishment. An examination of jury verdicts is thus an examination of what only part of the community believes is appropriate. That part of the community which would not consider the imposition of a death sentence--a part which must be taken into account in any assessment of contemporary standards of decency--is thus excluded when jury verdicts are examined. The fact that such a small number of juveniles have been sentenced to death by such juries is, accordingly, quite impressive.

constitutional validity of punishments as the nation progressed. Weems v. United States, 217 U.S. 349, 378 (1910). The decisions interpreting the Amendment's prohibition of cruel and unusual punishment have repeatedly recognized its evolutionary character. In Weems, the Court, discussing the flexibility of constitutional interpretation with respect to the Eighth Amendment, stated: "The clause of the Constitution ... may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 378 (citations omitted). A half-century later, the Court reaffirmed Weems' holding, recognizing that "the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving

standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 100-01. More recently, the Court recognized that "[t]he Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency...', against which we must evaluate penal measures," Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); see also Ford v. Wainwright, 477 U.S. at 406. The execution of juveniles as we approach the 1990s is inconsistent with our current enlightened sense of humane justice and would greatly undermine the evolving standards of decency that mark the progress of our maturing society.

For this Court to be able to carry out its duty of interpreting the Eighth Amendment in a "flexible and dynamic



manner," Gregg v. Georgia, 428 U.S. at 171, it must inevitably look not only to objective data but past that, to its own considered collective judgment. Its searching examination of the broad and idealistic precepts of the Eighth Amendment requires more than a statistical survey of sentencing practices; rather it requires an enlightened mind turned toward "what may be." Weems, 217 U.S. at 373. Such informed and considered judgment requires no less than a broad vision of what we as a society make ourselves out to be, and cannot be avoided by the totaling of arithmetical columns.

This broad vision, moreover, is not dependent on the subjective beliefs of individual Justices, but rather rests upon other indicia--depending of course on the category of persons involved--of the acceptability of sentencing those persons

to death. In order to properly resolve the question presented in this case, whether it is permissible to execute minors, it is imperative that the Court not exclusively focus on the decisions of various legislatures, judges and juries. To do so is to fail to realize that this Court serves a unique function in our constitutional scheme. The Court, insulated by constitutional design from the community pressures that are inherent in any capital murder case and partisan politics, must decide whether children are sufficiently morally culpable to suffer the penalty of death. Therefore, as the ultimate arbiter of the meaning of the Eighth Amendment, it is essential that the Court do more than calculate the "numbers" provided by juries and legislatures in the

various states.<sup>6</sup> Although the Court's independent judgment is--and should be--informed by the objective data, the ultimate issue of the constitutionality of a particular punishment is not compelled by this evidence.

Furthermore, an exclusive focus upon statutes and verdicts does not lead to a fully informed decision in the determination of whether it is consistent with our evolving standards of decency to execute minors. In fact, such an approach ignores significant evidence critical to an enlightened understanding of why those under the age of eighteen should not be sentenced to death. To exclusively focus on the objective indicia of societal

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<sup>6</sup> This is necessarily so. If the Court were to simply defer to legislative enactments and jury verdicts it would not be exercising its own independent judgment, thus making the Court's own Eighth Amendment analysis redundant to an examination of objective indicia.

standards primarily relied upon in Thompson fails to adequately consider germane social science evidence--the work of health professionals, educators, psychologists, and the like--pivotal to the Court's exercise of its informed judgment as to the constitutionality of executing persons under the age of eighteen.

## II. A CONSIDERATION OF THE MORAL BLAMEWORTHINESS OF JUVENILES SHOULD LEAD THE COURT TO CONCLUDE THAT NEITHER OF THE TWO PRINCIPAL PURPOSES OF THE DEATH PENALTY ARE MET BY THE EXECUTION OF JUVENILES

The Court has repeatedly recognized that the determination of whether the death penalty is an appropriate punishment--either for an individual offender or for a particular category of offenders--is essentially an inquiry into moral blameworthiness. See Booth v. Maryland, 482 U.S. \_\_\_\_, 107 S.Ct. 2529, 2533 (1987);

Enmund v. Florida, 458 U.S. 782, 798 (1982).<sup>7</sup> As was noted in Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, J., concurring in part and dissenting in part), "in the final analysis, capital punishment rests on not a legal but an ethical judgment--an assessment of what we called in Enmund the 'moral guilt' of the defendant." 468 U.S. at 481 (quoting Enmund, 458 U.S. at 800-01). In California v. Brown, \_\_\_U.S.\_\_\_\_, 107 S. Ct. 837 (1987), it was noted that "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the

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<sup>7</sup> In a number of prior decisions the Court has held that the Eighth Amendment forbids both barbarity and excessiveness of punishment in relation to the crime committed. See Coker, 433 U.S. at 592. Excessive punishments are those that: (1) "involve the unnecessary and wanton infliction of pain," Gregg, 428 U.S. at 173; or (2) are "grossly out of proportion to the severity of the crime." Gregg, 428 U.S. at 173.

defendant.... 107 S.Ct at 840 (O'Connor, J., concurring); see also Franklin v. Lynaugh, \_\_\_U.S.\_\_\_\_, 108 S.Ct. 2320, 2332 (1988) ("the principle underlying Lockett, Eddings, and Hitchcock is that punishment should be directly related to the personal culpability of the criminal defendant") (O'Connor, J., concurring). This is so because the question of whether an individual offender or category of offenders receive their just deserts for a crime can only be determined by assessing their moral blameworthiness in light of the legitimate constitutional purposes of capital punishment. See Tison v. Arizona, \_\_\_U.S.\_\_\_\_, 109 S.Ct. 1676, 1683 (1987).

The legitimate penological interests that have been accepted by the Court for capital punishment are deterrence and retribution. Ultimately, the Eighth Amendment issue turns on the courts'



independent judgment of whether the death penalty as "applied to those in [petitioners'] position measurably contributes" to the "'two principal social purposes ... [of] retribution and deterrence of capital crimes by prospective offenders.'" Enmund v. Florida, 458 U.S. at 798 (quoting Gregg v. Georgia, 428 U.S. at 153). If sentencing a particular offender or category of offenders to death does not further at least one of these two objectives, then the death penalty cannot be imposed consistent with the Eighth Amendment.<sup>8</sup> Examining those goals of retribution and deterrence in light of the lessened moral

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<sup>8</sup> "Unless the death penalty when applied to those in [petitioners'] position measurably contributes to one or both of [the two societal goals of retribution and deterrence], it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund v. Florida, 458 U.S. at 798 (quoting Coker, 433 U.S. at 592).

culpability of juveniles as a class, it is clear that the Eighth Amendment proscribes the execution of persons who were under the age of eighteen at the time of the commission of the crime.

A. Society's interest in retribution is not furthered by sentencing juveniles to death.

For society to seek retribution for a crime, the criminal must possess a sufficient degree of culpability or responsibility for that criminal act. In California v. Brown, Justice O'Connor stated:

[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in Eddings, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual."

455 U.S. at 110. Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasonable moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

107 S.Ct. at 841 (O'Connor, J., concurring); see also Tison v. Arizona, 109 S.Ct. at 1683 ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); Booth v. Maryland, 107 S.Ct. at 2533 (capital sentencing is essentially an inquiry into a defendant's "personal responsibility and moral guilt").

When assessing the culpability of juvenile offenders, the Court has recognized in various circumstances that their "moral guilt" is far less than that of mature, morally responsible adult crimi-

nals. As Justice Stevens wrote for the plurality in Thompson, "the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." 108 S.Ct. at 2698 (footnote omitted).<sup>9</sup> Our

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<sup>9</sup> The Court has noted in a number of decisions the lesser culpability of juveniles. See, e.g., May v. Anderson, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect.") (Frankfurter, J., concurring); Carey v. Population Services International, 431 U.S. 678, 693 n. 15 (1977); Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("[M]inors often lack the experience, perspective, and judgment" of adults); Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) ("Our history is replete with laws and judicial recognition that minors ... are less mature and responsible than adults."); New York v. Ferber, 458 U.S. 747, 757 (1982). For example, the Court has noted:

The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel

society's most absolute and terrible penalty must be reserved for those who know a fully-developed morality and who then transgress that morality. However, it is excessive for individuals who, as a result of their youth, have a morality that is inchoate and whose culpability is thus significantly lessened.<sup>10</sup>

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where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent.

H. L. v. Matheson, 450 U.S. 398, 421-22 (1981) (Stevens, J., concurring) (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part)).

<sup>10</sup> In this regard, it is important to note that the United States is the only western democracy--and one of the few nations in the world--that presently permits the execution of offenders who were under the age of eighteen at the time the crime was committed. See Brief of Amicus Curiae Amnesty International for Petitioner in Thompson v. Oklahoma and these cases.

As established by both the legal limitations placed on the civil rights of those under eighteen and social science, a lessened degree of moral blameworthiness is inextricably caught up in what it means to be a juvenile. This Court has noted that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors ... generally are less mature and responsible than adults." Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (footnote omitted).<sup>11</sup> Youths under eighteen years

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<sup>11</sup> See also Eddings, 455 U.S. at 115, n.11 ("Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's



of age face numerous legal restrictions on the rights of citizenship granted to others: for example, they may not vote, they may not drink alcoholic beverages, they may not serve on juries, they may not drive, they may not gamble, and they may not buy pornography. All of these restrictions recognize the societal consensus and common knowledge that a lessened responsibility is a concomitant of being young. In fact, every state has a comprehensive and separate juvenile justice system to deal with those of lessened culpability. See Kent v. United States, 383 U.S. 541, 554 n.19 (1966).

Moreover, the psychological makeup of the young weighs against using retribution

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fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" (quoting Twentieth Century Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978)).

as a rationale for executing them.<sup>12</sup> The turbulence of the adolescent years, which are generally considered to last from age eleven at least through age eighteen,<sup>13</sup> is caused by the onset of puberty and the transition to formal, logical modes of thinking from more reactive, concrete ways

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<sup>12</sup> "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." Thompson, 108 S.Ct. at 2699.

<sup>13</sup> See Hamburg & Wortman, Adolescent Development and Psychopathology, in 2 Psychiatry ch. 4 (J. Cavenar ed. 1985). It is critical to a proper resolution of the issue presented in these cases to recognize that the psychological makeup which results in the lessened moral blameworthiness of youth often extends beyond age eighteen into the early twenties. Building on this recognition, for example, many states do not permit those under the age of twenty-one to consume alcohol. Age eighteen, therefore, is a conservative assessment--rather than a liberal one--of the point at which an individual is sufficiently culpable to be sentenced to death.

of thinking.<sup>14</sup> Adolescence is marked by the relative absence of moral judgment and principles that characterize the thought patterns of adults.<sup>15</sup> Juveniles do not possess the experience or the grounding to be able to formulate a holistic moral universe, and they are dependent upon others, especially older relatives and friends, for moral guidance. Needless to say, the mental and social backgrounds of juveniles who have murdered are rarely healthy.<sup>16</sup>

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<sup>14</sup> See B. Inhelder & J. Piaget, The Growth of Logical Thinking from Childhood to Adolescence (1958).

<sup>15</sup> See Kohlberg & Gilligan, The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World, *Daedalus* 1051 (Fall 1971).

<sup>16</sup> In one study of fourteen randomly selected juveniles under the age of eighteen who had been sentenced to death, all fourteen were found to have suffered significant head injuries in childhood, nine were found to have serious neurological abnormalities, seven were diagnosed as psychotic, twelve had been

B. Deterrence fails as a rationale for executing juveniles because they lack the faculties for cold, deliberate calculation.

In Enmund v. Florida, this Court emphasized that capital punishment will only serve as a deterrent when "premeditation and deliberation" have preceded the capitally-punishable crime. Enmund, 458 U.S. at 799 (quoting Fisher v. United States, 328 U.S. 463 (1946) (Frankfurter, J., dissenting)). Those who murder in a flash of rage or on a sudden impulse will not be constrained from killing by a death penalty that is far from their thoughts prior to the crime. Neither will those who have no understanding of death or who lack the capacity to predict the conse-

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severely physically abused by family members, and five had been sodomized by older male relatives. Lewis, Pincus, Bard, Richardson, Pritchep, Feldman and Yeager, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 14 *Am. J. Psychiatry* 584, 588 (1988).

quences of their actions be deterred. Because it is precisely those under the age of eighteen who are most likely to kill under circumstances such as these, deterrence is not a valid rationale for executing adolescents.

Just as the changes we undergo in our adolescent years generate a rootless moral framework, they also cause teenagers to become more restless, impulsive and prone to risk-taking.<sup>17</sup> This impulsiveness is due to adolescents' dawning ability to reason in the abstract, which opens up new possibilities of experimentation. However, the urge to experiment is combined with a lack of experience and an inability to predict the possibly detrimental conse-

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<sup>17</sup> "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Thompson, 108 S.Ct. at 2700.

quences of their actions. All of these factors create in the adolescent mind a desire to try out reckless activities, such as fast driving, promiscuous sex, and drug and alcohol abuse. Due to teenagers' inexperience in predicting consequences, their impulsiveness is generally unaccompanied by fear of death or personal harm.<sup>18</sup>

Being unafraid of death, in fact, is integrally related to the adolescent mindset. Studies of suicide in adolescence show that teenagers often do not comprehend that death is different or that death could happen to them; "only old people die." In fact, suicide is the third leading cause of death among this

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<sup>18</sup> See Irwin & Millstein, Bio-psychosocial Correlates of Risk-Taking Behaviors, 7 J. Adolescent Health Care, No. 6S (Nov. 1986 Supp.).



age group.<sup>19</sup> Threatening to execute someone who is not afraid of being dead is a futile exercise and serves no valid penological purpose.

Finally, although it is of course true that if a particular teenager is executed, that particular teenager will not have an opportunity to kill again, specific deterrence is not a valid justification for executing teenagers. Juveniles convicted of murder and incarcerated have been overwhelmingly shown to be model prisoners and very rarely commit further crimes after incarceration.<sup>20</sup> By

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<sup>19</sup> See Sheras, Suicide in Adolescents, in Handbook of Clinical Child Psychology 759, 769-770 (C. Walker and M. Roberts eds. 1983); see also Kastenbaum, Time and Death in Adolescence, in The Meaning of Death 99 (H. Feifel ed. 1959); Fredlund, Children and Death from the School Setting Viewpoint, 47 J. School Health 533 (1977).

<sup>20</sup> See Vitello, Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v.

definition, they are young, are capable of rehabilitation, and may benefit from some of the social services unavailable to them prior to prison. However, "[c]apital punishment of our children inherently rejects humanity's future, which rests with the habilitation and rehabilitation of today's youth." Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 395 (1987) (footnote omitted). Thus, a deterrent that does not deter juveniles should not be applied against them, as it furthers no constitutionally valid societal interest, and is "nothing more than the purposeless and needless imposition of pain and suffering." Coker, 433 U.S. at 592.

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United States, 26 De Paul L. Rev. 23, 32-34 (1976).

CONCLUSION

In resolving the constitutional question presented in this case--whether the Eighth Amendment sanctions the imposition of the death penalty upon those under the age of eighteen--this Court's decision is not delimited by the actions of various legislatures, judges and juries. In the final analysis, this Court must bring to bear its own judgment in order to determine if our evolving standards of decency permit the execution of our children. The Court's independent judgment is not standardless, however, but rather is informed by examining the intrinsic characteristics of juveniles in light of the valid constitutional purposes of capital punishment. Such an examination in this case reveals that the imposition of the death penalty upon the very young--those under the age of

eighteen--serves no legitimate penological purpose and thus violates the Eighth Amendment. Therefore, the Court should vacate the sentences of death in these cases and remand them for the imposition of sentences of life imprisonment.

Respectfully submitted,

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87-5765

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1988

Supreme Court, U.S.

FILED

SEP 3 1988

JOSEPH F. SPANIOL, JR.  
CLERK

JOSE MARTINEZ HIGH.

*Petitioner,*

vs.

WALTER ZANT, WARDEN.

*Respondent.*

HEATH A. WILKINS.

*Petitioner,*

vs.

STATE OF MISSOURI

*Respondent.*

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT  
AND TO THE SUPREME COURT OF THE STATE OF MISSOURI

**BRIEF OF THE AMERICAN BAPTIST CHURCHES;  
THE AMERICAN FRIENDS SERVICE COMMITTEE;  
THE AMERICAN JEWISH COMMITTEE;  
THE AMERICAN JEWISH CONGRESS;  
THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST);  
THE MENNONITE CENTRAL COMMITTEE;  
THE GENERAL CONFERENCE MENNONITE CHURCH;  
THE NATIONAL COUNCIL OF CHURCHES;  
JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL  
ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA);  
THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE;  
THE UNION OF AMERICAN HEBREW CONGREGATIONS;  
THE UNITED CHURCH OF CHRIST COMMISSION FOR  
RACIAL JUSTICE; THE UNITED METHODIST CHURCH  
GENERAL BOARD OF CHURCH AND SOCIETY; AND  
THE UNITED STATES CATHOLIC CONFERENCE  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

(For Appearances. See Reverse Side of Cover)



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STATEMENT OF INTEREST OF AMICI CURIAE

Amici listed and described below are national religious bodies, judicatories, or organizations of the Protestant, Catholic, and Jewish faiths.<sup>1</sup> Amici believe that whatever one may think of the imposition of capital punishment generally, and we oppose it, the notion of executing children shocks the conscience. While Amici endorse many of the arguments presented in petitioners' and in the other amicus briefs, we present herein additional arguments distinctive to our own interests. Amici are interested in the issue before the Court because of:

(1) a conviction that children are uniquely redeemable and rehabilitatable,

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<sup>1</sup> Amici file this brief in support of petitioners by written consent of all parties pursuant to rule 36.2 of the Rules of the Court. The parties' letters of consent are on file with the Clerk of the Court.



they are capable of rapid and profound positive change, and their capacity for growth is the primary factor to be considered by society in assessing punishment for their antisocial acts;

(2) a conviction that since children have not fully achieved that degree of maturation which society requires of them before designating them "adults," and since their actions involve a lesser culpability than similar actions by adults, a lesser degree of punishment should be imposed for them than for adults who commit similar acts;

(3) a fundamental conviction that protection, nurture, education, moral development, and preparation of children for responsible adulthood is the most important task appropriately chosen by those responsible for children's care;

(4) a common and traditional

calling to be intimately involved with society in positive ways so as to discover and advance the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), and to help ensure that the criminal justice system reflects those standards;

(5) a recognition that it is Amici's responsibility when the Court explores the national consensus regarding the legal and moral decency of executing children, to provide the Court with the religious community's collective experiences with adolescents, which counsels against their execution;

(6) united opposition to the imposition of capital punishment because it is cruel and unusual and because capital punishment as it is applied in the United States is contrary to the

highest -- and even the simplest -- moral teachings of our traditions; and

(7) Amici's remorse that execution of children -- the casting out of those most dependent upon society's care-- ignores, distorts, and corrupts law's basic inclination toward justice.

Amici are:

1. THE AMERICAN BAPTIST CHURCHES IN THE U.S.A. (NATIONAL MINISTRIES) consists of 5,800 churches with a membership of 1.6 million.<sup>2</sup> The American Baptist Churches are deeply concerned with the moral, spiritual and emotional growth of children, who occupy a very special place in our ministry. In addition, in 1958 and 1966, the American Baptist

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<sup>2</sup> Membership numbers are approximate and have been either provided by the respective amicus from current records or taken from C. H. Jacquet, Jr., ed., The Yearbook of American & Canadian Churches: 1987 (New York: Abingdon Press, 1987).

Convention, a representative body of the Church, adopted a resolution, subsequently affirmed by the American Baptist Churches in 1980 and 1982, calling for the abolition of capital punishment, in part based on the conviction that "the emphasis in penology should be upon the process of creative, redemptive rehabilitation, rather than on primitive retribution."

2. THE AMERICAN FRIENDS SERVICE COMMITTEE (AFSC), as an expression of the Religious Society of Friends (Quakers) in America, since 1917 has been active in works of humanitarian relief and service. The AFSC has a vital interest in this litigation because of Friends' historic and continued advocacy for the rights of children and adolescents, because of our recognition of their profound potential for rehabilitation, and because of our

opposition to the taking of human life by the State.

3. THE AMERICAN JEWISH COMMITTEE (AJC) is an organization of some 50,000 members which was founded in 1906, primarily to protect the civil and religious rights of Jews. - The AJC is deeply committed to assuring liberty and justice for all Americans as the surest guarantee of the rights of all minorities. In 1972, the AJC issued a statement in opposition to the imposition of capital punishment. In July 1988, the AJC issued a statement directly related to this case: "Whatever one may think of capital punishment generally ... the notion of executing children shocks the conscience."

4. THE AMERICAN JEWISH CONGRESS is an organization of 50,000 members formed in 1918 to protect the economic, civil,

religious, and political rights of Jews in the United States. At its Biennial Convention in 1968, the American Jewish Congress adopted a resolution on capital punishment opposing its imposition based on the Congress' desire to "approach the problem of crime from both a rational and a deeply religious commitment."

5. THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST) has 4,214 churches with membership of 1.1 million. The Church is especially concerned with protecting and nurturing youth. In 1973, the General Assembly, a voting representative body of the Church, approved a resolution opposing the imposition of capital punishment and instead "favoring a program of rehabilitation for criminal offenders...."

6. THE MENNONITE CENTRAL COMMITTEE (MCC), founded in 1920, is the



cooperative relief and social service agency of North American Mennonite and Brethren in Christ Churches representing 300,000 members. MCC has a long-standing concern for youth reflected in its many programs working with youth. Mennonites have also been involved in criminal justice issues, including death penalty issues, for many years, having ministered to victims and families of victims as well as to offenders. The MCC's opposition to the death penalty, which dates back to the 17th century, is based in part on its belief that "true justice is created through restitution and reconciliation, not retribution." "Statement on the Death Penalty," adopted at MCC U.S. Peace Section meeting, December 4, 1982.

7. THE GENERAL CONFERENCE MENNONITE CHURCH was formed in 1860 uniting

Mennonites interested in doing missionary work. It consists of 211 churches with a membership of 36,000. In 1965, the General Conference Mennonite Church at its triennial conference resolved to "be more faithful ... in laboring ... for the correction of spiritual, economic, and social conditions which contribute to the making of juvenile offenders...." They further adopted a position in opposition to the imposition of capital punishment, finding that execution is a "repudiation of the rehabilitative aspect of the state's own task and function ... " and "removes [the offender] forever from the realm of the church's redemptive ministry."

8. THE NATIONAL COUNCIL OF CHURCHES is a "community of communions" composed of 32 national religious bodies in the United States having an aggregate

membership of 40,000,000. The Council is governed by a Governing Board of 265 members elected by the member communions in proportion to their size and support of the Council. The Governing Board adopts policy statements and resolutions that express its views on moral and spiritual issues and govern the operation of the program units of the Council. Among these have been three statements in opposition to the death penalty, adopted in 1968, 1976, and 1979. The 1968 Policy Statement adopted unanimously, was based in part on the "Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution." The Governing Board is especially concerned with adolescents and their special rehabilitative potential, as reflected in a "Resolution on Jails, Prisons and the Courts," adopted in 1972.

9. JAMES E. ANDREWS AS THE STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA): As the senior continuing officer of the General Assembly, the Stated Clerk is authorized "to retain legal counsel and institute or participate in legal proceedings." The General Assembly is the highest governing body of the Church, and represents the unity of the Presbyterian Church (USA) as a national Christian denomination with 3 million members organized into more than 11 thousand congregations. Through its antecedent religious bodies, The Presbyterian Church (USA) has existed as an organized religious denomination since 1706. Participation in this brief is based upon policy decided by the General Assembly following a process which provides for study and comment throughout the denomination. In 1974, the General

Assembly of the United Presbyterian Church (USA), urged that "a major concern of the church be the needs and rights of children ... [and] development of policies which ensure their full growth and development ... including the protection of their legal and civil rights." The United Presbyterian Church (U.S.A.) General Assembly in 1977, affirmed the position of the 171st General Assembly (1959) "that as Christians we must seek redemption of evil doers and not their death, and that the use of the death penalty tends to brutalize the society that condones it," and similarly the Presbyterian Church in the United States in its statement on Capital Punishment concluded that "[t]rue human justice which reflects the justice of God ... can only seek to maintain and preserve life -- the life of those who

threaten the lives of others as well as the lives of those who are threatened."

10. THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE is a non-profit civil rights organization founded in 1957 by Dr. Martin Luther King, Jr. and other ministers with the stated purpose of redeeming the soul of America by furthering Christian values and upholding the rights of the poor. SCLC has 90 chapters and 50,000 members across the country. Throughout the course of its history, SCLC has conducted workshops and seminars, held rallies and demonstrations and passed resolutions opposing the death penalty. SCLC holds that the death penalty is racially and economically biased and is merely a tool of oppression. Furthermore, it is the conviction of SCLC that juvenile executions are immoral, unethical and un-



Christian.

11. THE UNION OF AMERICAN HEBREW CONGREGATIONS represents 800 Reform congregations with a membership of over 1.3 million Jews in the United States. Its congregations and national affiliates have a broad range of program and policy activities in the area of children's rights grounded in a commitment to their proper care, nurture, and development. The UAHC has long been involved in issues of social and criminal justice and has for decades expressed its views in opposition to capital punishment on humanitarian, religious, moral, and human rights grounds.

12. THE UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE of the 1.7 million member United Church of Christ was created in the early 1960s to increase the involvement of the Church in

the continuing struggle for racial justice on a national level and to help develop new policies and practices to meet the needs of racial and ethnic communities across the United States. United Church of Christ has 6,400 churches with a membership of 1.6 million. The Church is especially interested in the obligations of society to its children. In 1979, the 12th General Synod of the UCC reaffirmed the declarations of earlier Synods in opposition to the death penalty, "opposition [that] is based on our understanding of the Christian Faith and the New Testament's call to redemptive love, mercy, and sanctity of life...."

13. THE UNITED METHODIST CHURCH GENERAL BOARD OF CHURCH AND SOCIETY is an instrumentality of the United Methodist Church; its purpose is to further the

work of the church in the sphere of social affairs. The United Methodist Church has 38,000 churches with 9.2 million members. The Social Principles of the United Methodist Church are an effort by the Church to speak to human issues from a sound biblical and theological foundation. Social Principle III, The Social Community, emphasizes that "children are ... acknowledged to be full human beings in their own right, but beings to whom adults and society in general have special obligations." The 1980 General Conference reaffirmed its opposition to the imposition of capital punishment, stating, "The United Methodist Church cannot accept retribution or social vengeance as a reason for taking human life. It violates our deepest belief in God as the creator and the redeemer of humankind,"

and in 1984, further stated, "Capital punishment ... is contrary to our belief that sentences should hold within them the possibility of reconciliation and restoration."

14. THE UNITED STATES CATHOLIC CONFERENCE is a civil entity of the American Catholic Bishops assisting them in service to the Church where voluntary, collective action is needed. In 1968, the U.S. Catholic Conference Committee on Social Development and World Peace issued its statement on capital punishment, stating, "The critical question for the Christian is how we can best foster respect for life, preserve the dignity of the human person and manifest the redemptive message of Christ. We do not believe more deaths are the response to the question." In 1974, the Catholic bishops declared their opposition to

capital punishment, and that opposition was reaffirmed in 1980. The Statement of the Bishops noted that "infliction of the death penalty extinguishes possibilities for reform and rehabilitation of the person ... as well as the opportunity for the criminal to make some creative compensation for the evil he or she has done. It also cuts off the possibility for a new beginning and of moral growth in a human life which has been seriously deformed."

#### SUMMARY OF ARGUMENT

This Court's treatment of children has been consistent and simple -- children receive special protection in the law because they are special in society, possessing a unique character blend that combines inexperience, lack of insight, and lack of perspective, Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982),

with an amazing "capacity for growth," Thompson v. Oklahoma, \_\_\_ U.S. \_\_\_, 108 S. Ct. 2687, 2699 (1988). Children and adolescents are not miniature adults, and because of their nature, they are reprieved from adult responsibility and deprived of adult privilege. All of this the law demands, because of common sense and the teachings of the ages. These Amici believe and will show that because of these considerations, there is a societal and legal consensus that youth ought to be treated differently than adults for all punishment purposes.

These Amici are particularly well-suited to inform the Court of the evolving standards of decency in society with respect to the execution of the young. Religious organizations are heavily relied upon by society to participate in child-rearing, family



counseling, and the inculcation of moral values. Indeed, the preparation of adolescents for adulthood is one of religion's highest callings. Through this endeavor, these Amici have first-hand experience with the qualities that make the young special.

Their most compelling quality is that children are redeemable and rehabilitatable. This quality defines adolescents' daily reality, as the young literally can change overnight. While children and adolescents are not adults, they do become adults, after a difficult and turbulent passage. The capacity to change, the inclination toward majority, and the ability to be rehabilitated--these characteristics identify children as different, and provide part of the impetus for the moral consensus that rejects their execution. (Argument 1).

Nothing is gained and all is lost by extinguishing the life of a youth who commits a crime. Rehabilitation ought to be the paramount penological goal, especially with children, and in all other areas dealing with children, it is. Execution, of course, pretermits rehabilitation. Other penological goals are similarly ill-served by execution of the young. Retribution -- giving a law-breaker what he or she deserves -- is misplaced in the adolescent context. Adolescents, almost by definition, possess reduced culpability for their acts, and do not "deserve" the ultimate sanction. Deterrence is removed as a legitimate reason for execution by another defining characteristic of adolescents -- immaturity. Adolescents do not, indeed cannot, fully foresee the consequences of their actions. That is

why society does not allow them to vote, marry, or stay out late.

For these and other reasons, there is a national moral consensus against execution of the young. All members of the Court agree that at some age, execution is cruel and unusual punishment. That age should be set at 18, an age that is firmly entrenched in this society as the time of passage from childhood to adulthood, the time at which responsibilities attach and disabilities are shed. Professional organizations uniformly select age 18 as the execution limit, and legislators increasingly do so. Age 18 is perhaps the most settled line drawn in this country for separating children from adults, and its utility in other contexts counsels for its use here.

(Argument II)

These Amici reject execution as a

proper punishment in any case. It is especially horrible in the case of the young. Children are protected for reasons too basic to question, and it defies logic to protect the young from themselves and others in all but this most demanding of circumstances. Just as this Court has positioned itself between children and harm innumerable times, the moral consensus is, for the same reasons, against the execution of children. Children are redeemable, and their execution is cruelty for the sake of cruelty.

#### ARGUMENT

I. THERE IS A SOCIETAL MORAL CONSENSUS THAT IT IS SINGULARLY INDECENT TO EXECUTE ADOLESCENTS, WHOSE INHERENT REDEEMABILITY AND DISABLING IMMATURITY DISTINGUISH THEM FROM ADULTS

Minors "have a very special place in life," May v. Anderson, 345 U.S. 520, 536 (1953), which law reflects and respects.

Thompson v. Oklahoma, \_\_\_ U.S. \_\_\_, 108 S. Ct. 2687, 2709 (1988) (O'Connor, J., concurring) ("Legislators recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults.") A "very special place" is also reserved for children in all religious communities, see Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), and for many of the same "policy" reasons -- minors make mistakes because of their immaturity, but they are specially redeemable. Because of "the lesser culpability of the juvenile offender, [and] the teenager's capacity for growth," Thompson, 108 S. Ct. at 2699 (plurality opinion), law -- religion's and society's -- separates children from

adults respecting both rights and responsibilities.

This common ground concerning adolescents shared by law and religion provides the religious community with an unusual opportunity and a unique duty to provide the Court with "evidence of societal standards of decency," Thompson, 108 S. Ct. at 2710 (O'Connor, J., concurring), which "mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958) with respect to punishment of youthful offenders. Amici will demonstrate that "as public opinion [has] become[] enlightened by a humane justice," Weems v. United States, 217 U.S. 349, 374 (1910), a moral consensus has emerged that recognizes that the execution of an individual who committed an offense when he or she was under eighteen years old is indefensible.



Because children and adolescents have great potential for growth, maturation, and thus redemption, their execution is nothing short of "the gratuitous infliction of suffering," Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), which is not to be tolerated by any, much less an enlightened, society.

A. Amici Are Well Suited To Provide Indicators of Contemporary Standards Of Decency, Especially with Respect To Juvenile Executions.

1. Religious Groups Are Traditionally Relied Upon by Framers of Public Policy.

The religious community traditionally has played a pervasive and dominant role in the formation of the American social conscience. Churches and synagogues have insistentlly and persuasively called not only upon their own people but also upon all citizens to

form a more just and humane society.<sup>3</sup> Not content merely to reflect the mores and prejudices of the imperfect human community, religious leaders -- both clergy and lay -- have represented, articulated, and reflected the impulse of the human spirit towards justice, compassion, and correct conduct.<sup>4</sup> The religious community routinely enlivens and enlightens public debate on matters presenting basic issues in American society. Indeed, since the earliest times, religion has been "woven into the

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<sup>3</sup> Joseph Cardinal Bernardin, Archbishop of Chicago, in a recent presentation before the American Bar Association, noted that "the purpose of the separation of church and state in American society is not to exclude the voice of religion from public debate, but to provide a context of religious freedom where the insights of each religious tradition can be set forth and tested.... To ignore the moral dimension of policy is to forsake our religious heritage." Bernardin, "The Role of the Religious Leader in the Formation of Public Policy," 34 DePaul L. Rev. 1, 5 (1984).

<sup>4</sup> Id. at 1.

underlying texture of American politics." A.J. Reichley, Religion in American Public Life 169 (Washington, D.C.: Brookings Institute, 1985).<sup>5</sup>

Religion's stewardship of moral values has led to new definitions of what is right and wrong in public policy, flowing from insights voiced by emerging religious movements.<sup>6</sup> Social reforms in

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<sup>5</sup> "From the standpoint of the public good, the most important service churches offer to secular life in a free society is to nurture moral values that help humanize capitalism and give direction to democracy. Up to a point, participation by the churches in the formation of public policy, particularly on issues with clear moral content, probably strengthens their ability to perform this nurturing function." A.J. Reichley, Religion in American Public Life 359 (Washington, D.C.: Brookings Institute, 1985).

<sup>6</sup> For example, the Protestant Reformation recast the role of the individual in society, the virtue of non-ecclesiastical occupations, and the right of all persons to search the Scripture for themselves, leading to common public education — the first public schools were in Germany at the behest of Martin Luther. Tsaroff, Radoslav A., The Moral Ideals of Our Civilizations 118 (N.Y.: E.P. Dutton, 1942).

The Wesleyan/Evangelical Revival in Britain

Great Britain in the nineteenth century were brought about because the evangelical impulse, stemming from John Wesley and George Whitefield and their followers, and similarly influential leaders in other religious groups, raised the level of what human beings understood they could and should expect of each

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in the 18th century reshaped the social and political structures through legal reforms brought about by evangelical influence. Elie Halévy, A History of the English People in the Nineteenth Century 399-400 (N.Y.: Peter Smith, 1949), quoted in Winthrop Hudson, The Great Tradition of the American Churches 102 (N.Y.: Harper and Bros., 1953). This same evangelical impulse fueled the growing opposition to slavery in Britain and cast opprobrium on the system of transportation of convicts to Australia. Robert Hughes, The Fatal Shore 162, 282 (N.Y.: Alfred A. Knopf, 1987).

Religiously inspired movements have been instrumental in many social reforms in the United States. "[C]hurch and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education." McDaniel v. Paty, 435 U.S. 618, 641 n.25 (1978) (Brennan, J. concurring) (quoting L. Tribe, American Constitutional Law, 1st ed., 866-67).

other. In short, the religious community frequently speaks to policy-makers about evolving standards of decency, policy-makers listen, and public policy changes.

2. Amici Are Especially Well-Suited To Address Society's Commitment To Reserve A Special Place For Juveniles Under The Law.

The central issue presented by the instant cases is also a matter of great social and religious importance -- whether there is a societal consensus that it is morally, and thus constitutionally, offensive to execute adolescents. As this Court has insisted, that inquiry must be determined by reference to the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 365 U.S. at 101. The identifying standard

should not be, or appear to be, merely the subjective views of

individual justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to public attitudes concerning a particular sentence...."

Coker v. Georgia, 433 U.S. 584, 592 (1977). These Amici -- religious judicatories, organizations, and agencies of major Protestant, Catholic, and Jewish denominations in the United States -- are, as in other areas of public policy, in a unique and important position to reflect public attitudes concerning the execution of the young.<sup>7</sup>

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<sup>7</sup> In the twentieth century, the policy statements of religious bodies in the United States and Europe have come to represent the product of a significant and highly developed process that brings together biblical/theological/ social science expertise with representative deliberations. The policy statements generally are the result of a long and careful process of study in which experts from theological, ethical and various technical fields, meeting over a period of years with program specialists in the denominations, research a given problem-area, prepare analyses, and draft proposed policies for the religious body. The result of this process is a well-considered and definitive statement



combining the contributions of experts and the scrutiny and discussion of a widely-representative deliberative process. As such, it represents a deliberate and informed consensus.

Through such deliberative processes, before the end of the last decade, a large majority of religious bodies or organizations in the United States had expressed their opposition to the imposition of capital punishment in the United States. These include:

- American Baptist Church in the U.S.A. (1977)
- American Ethical Union (1976)
- American Jewish Committee (1972)
- American Lutheran Church (1972)
- American Friends Service Committee (1976)
- Christian Church (Disciples of Christ) (1973)
- Christian Reformed Church (1979)
- Church of the Brethren (1979)
- Episcopal Church (1979)
- Friends Committee on National Legislation (1977)
- Lutheran Church in America (1966)
- Mennonite Church (1965)
- National Council of Churches in the U.S.A. (1976)
- Presbyterian Church in the United States
- Reformed Church in America (1965)
- Synagogue Council of America (1971)
- Unitarian Universalist Association (1979)
- United Church of Christ (1979)
- United Methodist Church (1980)
- United Presbyterian Church in the U.S.A. (1977)
- United States Catholic Conference (1978)

"Capital Punishment: What the Religious Community Says" (N.Y.: National Interreligious Task Force on Criminal Justice, Work Group on the Death

Law and society provide special, that is, different, treatment to minors because minors are more rehabilitatable and redeemable than adults. The history of the juvenile justice system in this country reveals that this special treatment for juveniles was prompted, and has been sustained, by the efforts of religious leaders.<sup>8</sup> The juvenile justice

Penalty, 1978). The Union of American Hebrew Congregations in 1959 took a position opposing the imposition of capital punishment, and in November 1980, the United States Catholic Conference also issued a statement in opposition to capital punishment.

Amici voice their special objections to execution of adolescents and children, objections separate and apart from those voiced to executions in general. While Amici oppose capital punishment in general, we find execution of the young even more abhorrent.

<sup>8</sup> In both the Old and New Testament, children are treated differently because they are children. The tradition continues. See, e.g., Criminal Justice, The General Board of Church and Society, the United Methodist Church 14 ("The Social Principles of the United Methodist Church call for special attention to the rights of children and youth."); "Political Responsibility: Choices for the 1980s," A Statement of the

system can be traced to two major reforms which occurred during the nineteenth century:

The opening of the New York House of Refuge has been denominated "the first great event in child welfare" in the period before the Civil War. The second reform, probably the better known of the two, was the institution of the juvenile court by the Illinois legislature in 1899.

Fox, S., "Juvenile Justice Reform: An Historical Perspective," 22 Stan. L. Rev. 1107 (1970). The House of Refuge -- which "offer[ed] food, shelter, and education to the homeless and destitute youth of New York, and ... remov[ed] juvenile offenders from the prison company of adult convicts" -- was a project of "Quaker reformers who had gained prominence through earlier works

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Administrative Board, United States Catholic Conference, March 22, 1984, 13.

of charity and reform." Id. at 1188-89.<sup>9</sup> The courts soon followed this religiously inspired movement, adopted "the philanthropic protestations of the reformers," id. at 1204, and the juvenile court system was born. See Kent v. United States, 303 U.S. 541, 554-55 (1966) ("The objectives [of the juvenile

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<sup>9</sup> "Can it be consistent with real justice, that delinquents of this character, should be consigned to the infamy and severity of punishments, which must inevitably tend to perfect the work of degradation, to sink them still deeper in corruption, to deprive them of their remaining sensibility to the shame of exposure, and establish them in all hardihood of daring and desperate villainy? Is it possible that a Christian community can lend its sanction to such a process without any effort to rescue and save?" Society for the Prevention of Pauperism in the City of New York, Report on the Subject of Erecting a House of Refuge for Vagrant and Depraved Young People, reprinted in Society for the Reformation of Juvenile Delinquents, Documents Relative to the House of Refuge 13 (N. Hart ed. 1832) (emphasis added). The House of Refuge was "to effect the moral reformation of delinquents," id. at 11-12, because "[r]eformation is, or ought to be, an object dear to every man who votes for a penal statute. In the cause of the young it is almost everything...." Id. at 33.

court] are to provide resources of guidance and rehabilitation....") Every state now has a juvenile court act, *id.* at 554 n.19, and this Court has acknowledged the religious "child savers"<sup>10</sup> who prompted the reform.<sup>11</sup>

In a very real sense, then, this juvenile protection movement, begun and influenced by some of the *Amici* here (or

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<sup>10</sup> Comment, "Capital Punishment for Minors: An Eighth Amendment Analysis," 74 J. Crim. L. & Criminology 1470, 1474 (1983).

<sup>11</sup>

"[The reformers] were profoundly convinced that a society's duty to the child could not be confined to the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent' but 'what is he, how has he become what he is, and what had best to be done in his interest and in the state's to save him from a downward career.' The child essentially good, as they saw it, was to be made to feel that he is the object of [the state's] care and solicitude...."

*In re Gault*, 387 U.S. 115 (1967). All juvenile court systems have rehabilitation as their goal. Paulsan, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957).

other religious bodies within their traditions), is responsible for the issue now before the Court. Juveniles have fewer rights but greater protection than adults because the religious community, and thence the legal community, recognized and protected that all-defining characteristic of the young -- their ability to reform, mature, be rehabilitated; in short, their "capacity for growth." *Thompson*, 108 S. Ct. at 2699. The common religious/legal tenet that lends *Amici* their special voice in the instant debate arises from the doctrinal cross-currents between modern juvenile law and religion. Rehabilitation and redeemability<sup>12</sup> are virtually

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<sup>12</sup> "The Christian concern is redemptive." John Howard Yoder, "The Death Penalty: A Christian Perspective," in Capital Punishment Study Guide 14 (Winnipeg, Manitoba: Victim Offender Ministries, Mennonite Central Committee Canada, 1980, repr. 1985). In Jewish thought, this concept is understood as "Teshuvah," which



synonymous in the juvenile context, and adolescents, more than any other group, possess this religious, cultural, behavioral, and legal characteristic.<sup>13</sup>

B. Execution of Persons Who Were Minors At The Time Of The Commission Of The Offense Violates Contemporary Standards Of Decency -- Youth Are Different.

This nation has manifested a great

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embodies the notion that everyone is capable of making atonement for mistakes and creating a better future. The Jewish High Holy Day of Yom Kippur is an annual day of atonement, a day in which to make atonement for the mistakes of the past year, receive forgiveness from God, and begin again.

<sup>13</sup> Because of this very special potential for redemption and rehabilitation, young people must not be executed. As will be shown, "children are constantly maturing," Feld, "Juvenile Court Legislative Reform and the Serious Offender: Dismantling the 'Rehabilitative Ideal'," 15 Minn. L. Rev. 167, 231 (1981), and "where there is a glimmer of hope for repentance and rehabilitation, Christians [and society] should oppose capital punishment as a legalistic retribution," Sub-Committee of Public Affairs Committee of Ontario and Quebec; see also Volume II, Pastoral Letters of the United States Catholic Bishops, Statement on Capital Punishment, 427, 429 (1980) ("Punishment must be determined with a view ... to the reformation of the criminal and his reintegration into society....").

and growing concern for the care and nurture of children, and has enforced that concern through law. Systems of education, nutrition and housing, prohibitions against and limitations on child labor, prohibitions of and punishment for abuse and neglect of children, and so on, deal with and reflect the maturing commitment of American society to the care of children, not just for the children's sake but for the sake of the country. Children are protected because they grow up. Laws and institutions governing juvenile justice similarly reflect an evolving and maturing commitment to the goals of rehabilitation and reconciliation of children. Thompson, 108 S. Ct. 2687 (1988) (plurality opinion). The social concern for the welfare of children includes systematic legal restrictions on

the ability of young people fully to participate in society as adults. This system of enforced child dependence on adult society not only tolerates the less responsible acts of children, but also requires that adults take legal and moral responsibility for actions of young people until such time as the young can fully appreciate those actions. See, e.g., Parham v. J.R., 442 U.S. 584 (1979).

The experience and considered judgment of these Amici is that the execution of the young fundamentally abrogates society's chosen responsibility to restore and reconcile its children, and gratuitously bypasses a unique opportunity for rehabilitation. Executions of the young are opposed, for these and other reasons, by persons primarily charged with the care and

development of young people.<sup>14</sup> Because youth are different, juvenile court judges,<sup>15</sup> religious leaders, medical, psychological, and psychiatric experts,<sup>16</sup>

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<sup>14</sup> It further counsels against child executions when it is understood that, in addition to children's inherent immaturity and capacity for rehabilitation, homicidal adolescents, more so than other adolescents, "must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely unsupportive but violent and brutally abusive," Thompson, 108 S.Ct. at 2699 n.42, quoting Lewis, Pincus, Bard, Richardson, Pritchep, Feldman & Yeager, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States 11 (1987). Society's obligation is to all children, and juvenile crime represents "a failure of family, school, and the social system, which share responsibility for the development of American youth," Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

<sup>15</sup> On July 14, 1988, the National Council of Juvenile and Family Court Judges adopted the following Resolution: "BE IT RESOLVED that the National Council of Juvenile and Family Court Judges is opposed to capital punishment for those who committed an offense while under the age of eighteen years."

<sup>16</sup> See Brief of American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in

child welfare workers and advocates,<sup>17</sup> professional educators, scholars and practitioners in juvenile criminal law, and increasingly, legislators believe that execution of the young is gratuitous and excessive punishment.<sup>18</sup>

The settled empirical and objective data and experience which has led to this widespread rejection of child executions point to at least two important differences between children and adults, either or both of which makes execution of the young unacceptable. First, an adolescent is not a little adult:

The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of

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Support of Petitioner, in Thompson.

<sup>17</sup> See Brief of Child Welfare League of America, et al., as Amici Curiae in Support of Petitioner in Thompson.

<sup>18</sup> See n.29, infra.

its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them.

Jeremy Bentham, Theory of Legislation (Boston: Weeks, Jordan, 1840, Vol. I, p. 248); see also Thompson, 108 S. Ct. at 2693 n.23 (plurality opinion). "Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.'" Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982), quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979).<sup>19</sup> This view is confirmed by a vast body of clinical

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<sup>19</sup> This first factor -- diminished culpability -- will not be further discussed here, but will become more important in Argument II, infra, to demonstrate that none of the traditional theories supporting the death penalty apply to persons with reduced culpability.



research and literature.<sup>20</sup>

Second, even though adolescents are not little adults, they nevertheless have the resilient capacity to grow -- intellectually, emotionally, and spiritually -- into adults, notwithstanding setbacks along that route. The young must learn, and they do, but the learning often comes by making, and correcting, mistakes. The "possibility for reform and rehabilitation," Statement Issued by the United States Catholic Bishops, supra, p. 431, defines the standard of decency which guides our dealings with law-breakers. Unlike any other group of individuals, children grow up, and the reality of that maturation process warrants lesser punishment for

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<sup>20</sup> See Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in Support of Petitioner, p. 4, in Thompson.

children than for adults.<sup>21</sup>

Certainly, the experience of these Amici is that children and adolescents are redeemable. In that way, they are truly special, and countless testimonials could be provided to demonstrate to the Court that religious organizations and institutions are successful at working with troubled adolescents and in helping them return to the path of proper citizenship.<sup>22</sup> The experience of other

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<sup>21</sup> For this reason, even when a decision has been made to try a juvenile in adult court, full adult penalties are not necessarily appropriate. Trial of a juvenile in adult court, whether by legislative, judicial, or prosecutorial waiver, rarely involves a determination of the minor's maturity. Note, "The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles," 61 Ind. L.J. 757, 771 n.81 (1986).

<sup>22</sup> Such testimonials are not necessary -- this Court has long recognized that the process through which children become adults is one that must involve these Amici, and parents, whose responsibility it is to prepare children for "additional obligations." Pierce v. Society of Sisters, 268 U.S. at 535. "The duty to prepare the child for 'additional obligations'... must be

amici, whose function it is to enter the maturation process when family/religion have not been enough, reinforces our belief from our experience that adolescents are specially redeemable and rehabilitatable.

First, as a matter of developmental psychology, children are redeemable. Adolescence, according to mental health experts, is a turbulent time. See Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae in Support of Petitioner in Thompson. Adolescents are by nature capable of significant and spontaneous change. Id. at 7. Consequently, "incurrigibility is inconsistent with

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read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." Wisconsin v. Yoder, 406 U.S. at 233.

youth ... it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." Workman v. Commonwealth, 429 S.W. 2d 374, 378 (Ky. 1968). Cognitive skills -- on which culpability must rest -- develop continuously. Greater tolerance respecting youthful offenders is justified by reason of their heightened capacity for behavior modification, according to mental health experts. Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amici Curiae, supra, at 28. Adolescents are more responsive than adults to rehabilitative treatment, due to the fact that they are still going through the maturation process. Id.

Second, the practical experience of

workers with juveniles teaches that children are rehabilitated. Social workers, youth counselors, juvenile court caseworkers, and others all intimately familiar with youthful offenders agree -- redemption works with children and adolescents. Social scientific literature is replete with evidence that even the most violent adolescents are capable of dramatic change and rehabilitation. For example, a two-year follow-up study of homicide offenders paroled from the California Youth Authority (CYA) in 1984 showed that 76.7% of these offenders successfully completed their period of parole, while CYA parolees who had been convicted of non-homicide offenses had a parole success rate of only 41.9%. California Youth Authority, Offender-Based Institutional Tracking System (1987). A

study of chronic and violent juvenile offenders in Ohio similarly found that approximately 60% of youths who were charged with murder in juvenile court were not subsequently even re-arrested as adults. D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, The Violent Few (1977).<sup>23</sup> Observers and caseworkers have repeatedly found that adolescents can be taught to conform to society's norms, precisely because juvenile crimes grow out of the "[a]dolescent's ... vulnerab[ility], ... impulsivi[ty], and ... lack of self-discipline[]." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978), (quoted

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<sup>23</sup> Research has long shown that as people get older, their propensity to commit crime decreases, so that by the time they reach their early twenties, they commit fewer offenses. Note, "The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles," 61 Ind. L.J. 757, 786 n.174 (1986).



in Eddings v. Oklahoma, 455 U.S. at 115 n.11).

Thus, it is our experience and the experience of other professionals with whom we often work, and from whom we learn, that children are different in a way that requires a legal distinction. Children by their nature are not hopeless, incorrigible, and unredeemable. They are the very embodiment of our hope for humankind because of their proven ability to be and do better, to contribute and to succeed, and to amaze and encourage us with the power of the human spirit. Such potential should not be extinguished, and these Amici believe that the "'evolving standards of decency' of our society," Thompson, 108 S. Ct. at 2719 (dissenting opinion), require that children be recognized as different for death penalty purposes.

II. THE EXECUTION OF AN INDIVIDUAL WHO WAS UNDER EIGHTEEN YEARS OF AGE AT THE TIME OF THE OFFENSE IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Some four-year-olds have the maturity of a two-year-old, some have the maturity of a six-year-old. Some eighteen-year-olds have the maturity of a fifteen-year-old, some fifteen-year-olds have the maturity of an eighteen-year-old. Legal adulthood in this country is a function not of maturity but of age. Thus the immature eighteen-year-old may fight a war and vote, while the mature fifteen-year-old is exempted from such duties and pines for such privileges.

This line-drawing is arbitrary in the same sense that all societal decisions are arbitrary, based as they are on decades and centuries of tradition, and interwoven as they must be with inarticulable premises and seemingly

a priori conclusions. Despite this characteristic, line-drawing reflects, or creates, this society's standard of decency in some areas, and the line is drawn at a point which most can agree is "right." There is no "logic" which proves that no person is mature enough until age 18 (or 21) to drink alcohol, and no "logic" which proves that no one under 16 has the maturity to drive an automobile. But these are rules our society imposes on our children, and these are the rules under which they are forced or allowed to operate, notwithstanding their varying degrees of intellectual, social, religious, moral, and political development.

And so it is when the Court decides to draw a line on the death penalty. Thompson, 108 S. Ct. at 2706 ("The plurality and the dissent agree on two

fundamental propositions: that there is some age below which a juvenile criminal can never be constitutionally punished by death, and that our precedents require us to locate this age....") (O'Connor, J., concurring). The line selected will have its arbitrary aspects.<sup>24</sup> Its point, however, will be determined by what this society intuitively knows, as reflected in other drawn lines, and it will be drawn according to what is the accepted standard of decency in this society. While these Amici believe that execution is wrong for anyone, it is especially wrong for adolescents, and if this Court is to choose an age below which

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<sup>24</sup> Legal classifications of children as children almost never allow a child to assume the rights and privileges of adulthood prematurely -- even upon a showing of exceptional maturity. Where they do so allow, ironically, a history of violent juvenile criminal behavior would ipso facto preclude a finding of exceptional maturity, and would bar the child's assumption of adult status.

executions will be barred, society has already paved the way. Age 18 is the most clearly defined, the most heavily relied upon and assumption-filled age line in this country, and perhaps in the world. Eighteen is not only the line for adulthood, but it is also the line increasingly chosen by legislators for the allowance of executions. The experience of these Amici is that in other spheres and for other purposes, age 18 -- while somewhat arbitrary -- by and large works, and that it indeed reflects society's notion of what is properly understood as the time for passage into adulthood. For Eighth Amendment purposes, as for so many other purposes, age 18 works, and the execution of one who was under 18 at the time of the offense is cruel and unusual punishment.

A. Executing Minors Is The Gratuitous Imposition Of Suffering, And Offends The Standards Of Decency Expected In An Enlightened Society.

This Court has concluded that there are certain societal benefits from executions. Even if true, and even if those benefits are so weighty that they justify taking life -- adult life -- conclusions with which Amici strongly disagree, the purported justifications for execution ring especially hollow when applied to children. Children are different from adults. Nothing good accompanies executing them.

Minors have two distinct characteristics: immaturity and the ability to grow.<sup>25</sup> Unless it is to be "nothing more than the purposeless and needless imposition of pain and

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<sup>25</sup> Minors who are on death row have significantly more characteristics in common: organic brain damage, neuropsychological damage, and a history of being abused. See n.14, supra.



suffering," Coker v. Georgia, 433 U.S. at 592, executions must serve some legitimate social purpose. "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Gregg v. Georgia, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, JJ.). Neither goal is furthered by execution of adolescents. ABA Juvenile Death Penalty Report 8-9 (Those justifications "lose much of their persuasiveness when applied to an adolescent's case.").

Retribution has as its benchmark "that punishment should be directly related to the personal culpability of the criminal defendant." California v. Brown, 479 U.S. 538, \_\_\_, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). Thus, persons who are insane at the time

of a crime go unpunished, persons with diminished capacity are convicted of crimes carrying less severe penalties, and unintentional criminal acts are less blameworthy and punished less than intentional acts. Even an adult who kills may not be executed if the killing was unintentional. Enmund v. Florida, 458 U.S. 782, 797 (1982). "Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligation to its children," Thompson, 108 S. Ct. at 2699 (plurality opinion), retribution is incongruous in connection with imposition of the death penalty on children. Society can feel little revenge by executing a person who has minimal responsibility, because one with lower responsibility does not deserve the greatest punishment. For the same

reasons, deterrence is inapplicable. "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." Id. at 2700.

Punishment should not just do something bad for an offender, but should also do something good for society. No good comes from executing children. It is self-evident that execution is antithetical to society's stated goals for and commitment to youth -- rehabilitation. The difference between an adult and a child is "responsibility." Children are not treated as being fully responsible. Society assumes responsibility for children. It adds the ultimate insult to injury for society to fail in its responsibility to a child,

and then to hold the child responsible for the failure by executing him or her. Society's mistakes should be corrected, not eradicated, and with adolescents, more than with any others, correction has the highest potential.

B. Objective Indicia Support Age 18 As The Age For Adult Responsibility.

The cruel and unusual punishment clause of the Eighth Amendment prohibits punishments that violate "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. at 101, as those standards are objectified by such indicia as legislation and actual jury verdicts, and as they have been expressed by respected professional organizations. Thompson, 108 S. Ct. at 2691-92 (plurality opinion). All three of these sources have agreed with these Amici, have recognized the "societal standard of

decency" that execution of adolescents is cruel and unusual punishment, and have decided that age 18 is, or ought to be, controlling.

For example, there is no death penalty in juvenile court. This legislative reality speaks volumes. Even louder, however, is the proclamation from juvenile court judges, the very persons with the most direct contact with persons under 18 years of age who commit criminal offenses, and with the most experience in how juveniles can and should be sentenced. Juvenile court judges publicly and formally oppose executions of persons under 18 at the time of the offense.<sup>26</sup> Others in the legal community concur. The American Bar Association, the American Law Institute's Model Penal Code, and the National Commission on

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<sup>26</sup> See n.15, supra.

Reform of Federal Criminal Laws all take the position that eighteen years is the minimum age for execution eligibility.<sup>27</sup> In addition, in Thompson, no fewer than twenty-five professional organizations filed or joined in amici briefs opposing juvenile executions, with age eighteen being the only cut-off mark suggested.

Legislators uniformly choose age 18 as the point at which major disabilities are shed and massive responsibilities are assumed. Such legislative fiat is widely accepted. New Jersey v. T.L.O., 469 U.S. 325 (1985) (Powell, J., concurring); New York v. Ferber, 458 U.S. 747 (1982). In most states and for most purposes, a "minor" means one below 18, and a minor

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<sup>27</sup> See American Bar Association Report 410, 117A, approved August 1983; American Law Institute, Model Penal Code §210.6(1)(d) (Proposed Official Draft 1962); and National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code §3603 (1971).



has severely restricted rights and privileges. A person who is one day shy of 18 cannot vote or contract; nor can they, without permission, marry, get a driver's license, or stay out late.<sup>28</sup> In addition, age 18 is the chosen maximum age for juvenile court jurisdiction in thirty-seven states and the District of Columbia. See National Institute for Juvenile Justice and Delinquency, Major Issues in Juvenile Justice Information and Training, Youths in Adult Courts: Beyond Two Worlds 44, 86 n.2 (1982). Legislation specifically on the death penalty also chooses eighteen.<sup>29</sup>

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<sup>28</sup> Other disabilities of those below the age of 18 are described in the brief of the National Legal Aid and Defender Association, et al., in Thompson.

<sup>29</sup> The recently enacted federal death penalty legislation -- and its predecessor bills -- provides that a sentence of death may not be imposed upon a person who was less than 18 years old at the time of the offense. 134 Cong. Rec. S7579-S7580 (June 10, 1988). Fourteen states and

Finally, this Court looks to the actions of jurors as an indication of standards of decency. The actions of jurors also

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the District of Columbia have rejected capital punishment completely. Of the 36 states retaining the death penalty, 19 set no minimum age. Thompson, 108 S.Ct. at 2694-95.

It can hardly be said that the states with no minimum age have consciously sanctioned execution of one under 18, for there is no evidence that these states "realize[d] that [their] ... actions would have the effect of rendering (minors under the age of 18) death-eligible or ... [gave] the question the serious consideration what would have been reflected in the explicit choice of some minimum age for death-eligibility." Thompson, 108 S. Ct. at 2711 (O'Connor, J., concurring).

Eighteen states expressly exclude youths under age 16, 17, or 18 in their death penalty statutes. Of these eighteen states, twelve states establish a minimum age of 18. The trend is 18. Seven of the 12 states with an age 18 minimum selected that age limit within the past seven years. Ohio in 1981 set 18 as its minimum age for execution; Nebraska did so in 1982; Tennessee did so in 1984; Colorado and Oregon did so in 1985; New Jersey did so in 1986. See Ohio Rev. Code Ann. §2929.02(A) (Page 1984); Tenn. Code Ann. §§37-1-102(3), 4:37-1-103, and 37-1-134(a)(1) (Repl. 1984); Neb. Rev. Stat. §28-105.01 (1985); Colo. Rev. Stat. §16-11-103 (1986); Or. Rev. Stat. §161-620 (1985); N.J. Stat. Ann. §2C:11-3f (West 1986) (L. 1985, ch. 478, §1, approved Jan. 17, 1986).

reflect a repugnance to the execution of juveniles.<sup>30</sup>

C. Age 18 Is Inextricably Interwoven in the Fabric of Morality Entertained by This Society.

A society's moral judgment is as solidly reflected by its religious experience as by the opinions of "professionals," or the actions of legislatures or jurors. These Amici daily gauge "the evolving standards ... entertained by the society," Thompson, 108 S.Ct at 2719 (Scalia, J., dissenting,) and those standards soundly reject executing adolescents. The objective fact is that society recoils at the thought of executing a person who committed a crime as a minor, and the

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<sup>30</sup> In 1983, 38 of the persons on death row were under 18 at the time of their crime. In 1986, the number had dropped to 32, but the adult death row population had increased by 500. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. L. Rev. 363, 384 (1987).

inescapable societal consensus is that a minor is a person under 18 years of age. If the jurisprudence of the death penalty truly turns on the conscience of our citizens, this Court must draw the line for execution at age 18, as it has been drawn throughout the stratum of decisions concerning youth.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1988

Supreme Court, U.S.

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JOSE MARTINEZ HIGH,

*Petitioner,*

v.

WALTER ZANT, WARDEN,

*Respondent.*

HEATH A. WILKINS,

*Petitioner,*

v.

STATE OF MISSOURI,

*Respondent.*

On Writs of Certiorari to the United States Court of Appeals  
for the Eleventh Circuit and the Supreme Court of the State of Missouri

**BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA,  
NATIONAL PARENTS AND TEACHERS ASSOCIATION,  
NATIONAL COUNCIL ON CRIME AND DELINQUENCY,  
CHILDREN'S DEFENSE FUND, NATIONAL ASSOCIATION  
OF SOCIAL WORKERS, NATIONAL BLACK CHILD  
DEVELOPMENT INSTITUTE, NATIONAL NETWORK OF  
RUNAWAY AND YOUTH SERVICES, NATIONAL YOUTH  
ADVOCATE PROGRAM, AND AMERICAN YOUTH WORK  
CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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INTERESTS OF AMICI CURIAE<sup>1</sup>

The Amici who have joined in submitting this brief are linked by their special concern for children and their extensive experience in working with troubled youth. It is the hope of Amici that their insights into the unique nature of childhood and the attributes of children will be of assistance to the Court in resolving the difficult issues raised in these cases.

The Child Welfare League of America is an association of approximately 450 leading child welfare agencies in the United States and Canada and 1,200 affiliates in twenty-seven state associations, devoted to improving services for deprived, neglected, and abused children. The Child Welfare League

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1/ This brief is being filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the Court.



includes in its membership both public and voluntary, as well as both religious and non-sectarian agencies.

The National Parents and Teachers Association (PTA) is the nation's largest child advocacy organization, comprising 6.4 million members in 50 state congresses and 26,000 local units nationwide and in Europe. A 501(c)(3) non-profit corporation, PTA is devoted to the education, health, protection, and welfare of children and youth. The national PTA pursues child-related federal legislation, prepares educational materials, and promotes parental involvement in the lives of children.

The National Council on Crime and Delinquency is a non-profit corporation that conducts research, recommends national juvenile justice standards, and works with correctional and juvenile court profession-

als and citizens' groups to improve the quality of the criminal and juvenile justice systems.

The Children's Defense Fund (CDF) is a national public charity that represents and advocates on behalf of low-income, minority and handicapped children. CDF strives for preventive intervention before youth drop out of school, suffer family break-down or get into trouble. CDF also addresses the special needs of troubled youth in the child welfare, juvenile justice, and mental health systems.

The National Association of Social Workers (NASW), a non-profit professional association with over 115,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice and to improving the

quality of life through utilization of social work knowledge and skills.

The National Black Child Development Institute (NBCDI) is a non-profit organization dedicated to improving the quality of life for Black children and youth. NBCDI's network of affiliates provides services such as finding adoptive homes for Black children and providing tutoring and leadership training for youth, and its volunteers help educate their communities about national, state, and local issues facing Black youth.

The National Network of Runaway and Youth Services, Inc. is a membership organization of approximately 1000 community-based youth-serving agencies, which serves as a communication, information and public education exchange on issues affecting youth, advocates on behalf of vulnerable youth and their families, and

conducts research and demonstration projects.

The National Youth Advocate Program, Inc., is a private non-profit youth advocacy and direct-service organization, which is responsible for developing and providing a range of individualized, flexible and innovative community-based programs for very troubled and needy youth as an alternative to institutionalization, and which has had considerable success in working with older adolescents with very serious needs and behavior problems.

The American Youth Work Center, a Washington-based organization that promotes improvement of services to children at risk, holds national and international training conferences and prepares reports on issues relating to youth services.

## SUMMARY OF ARGUMENT

Amici's lengthy experience in counseling and rehabilitating troubled youth compels the conclusion that no person should ever be executed for an offense committed while under the age of eighteen years.

In Part I of this brief, amici demonstrate the unavailability of the conclusion that the Eighth Amendment establishes safeguards against the execution of children who were under eighteen at the time of the offense. Amici draw on their knowledge of adolescents to show that the same factors that render capital punishment unconstitutional for very young children render it equally improper for all children below the age of eighteen. In particular, amici call on their knowledge of youthful offenders to show that even extremely violent youth are capable of rehabilitation

when provided with appropriate services. It would not only be senseless, but fundamentally inhumane, to extinguish the lives of young people who could grow into productive and responsible members of society.

Part II demonstrates that even assuming arguendo that viable distinctions could be drawn between sub-classes of children for purposes of capital punishment, the statutory schemes of Georgia and Missouri fail to serve that classification function in a constitutionally acceptable manner.

## ARGUMENT

### I.

The Eighth Amendment Self-Evidently Prohibits the Execution of Children, and There Is No Constitutionally Acceptable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

- A. Examination of the Reasons Why Execution of Very Young Children is Self-Evidently Unconstitutional Reveals the Factors that this Court Should Consider in Determining the Minimum Age for Eligibility for Capital Punishment



Last Term, all the members of this Court "agree[d] on [the] . . . fundamental proposition . . . that there is some age below which a juvenile's crimes can never be constitutionally punished by death." Thompson v. Oklahoma, 108 S. Ct. 2687, 2706 (1988) (O'Connor, J., concurring). See id. at 2695 (plurality opinion); id. at 2718 (Scalia, J., dissenting).

The hypothetical employed by the plurality in Thompson in describing this proposition as "self-evident" -- the execution of a ten-year-old (see id. at 2695 & n.27) -- is worth considering in order to extract the factors that render it compelling. As this hypothetical makes apparent, the execution of a child does not contribute measurably to either of the "two principal social purposes" of capital punishment: "deterrence of capital crimes by prospective

offenders" and "retribution." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

This Court concluded in Gregg, supra, that "the death penalty undoubtedly is a significant deterrent" for many criminals. 428 U.S. at 185-86. In speaking of the quintessential type of murderer who might be deterred by capital punishment -- the "murder[er] for hire" who engages in a "cold calculus . . . preced[ing] the decision to act," id. at 186, the Court presumably was envisioning a sophisticated adult. With respect to adult murderers, it seems quite clear that the expansion of the range of the death-eligible population to include ten-year-olds would not contribute even marginally to the goal of deterring adults from committing capital crimes. Adults are not likely to view the execution of a ten-year-

old as having any relevance to them.

Thus, the only population that could even conceivably be affected by the inclusion of ten-year-olds in the death-eligible population would be children in the same general age range. But, in fact, the execution of a ten-year-old would not deter other young children from homicide, for such children do not have the ability to make rational judgments about their behavior. Ruled by their feelings, extraordinarily dependent upon their parents for protection and guidance and survival, and emotionally bound to their families, young children's "judgments" are the products of family dynamics and emotion, rather than the considered assessment of alternative courses of behavior. Thus, a ten-year-old might kill someone (or at least attempt it) if the homicide seemed necessary to the aid and

comfort of his family or if it seemed that the family would condone or approve it. The threat of death would no more deter such a child than it would "those [adults] who act in passion for whom the threat of death has little or no deterrent effect." Gregg v. Georgia, supra, 428 U.S. at 185.

Similarly, the execution of a ten-year-old would not satisfy society's need for retribution. Ten-year-olds do not yet have the capacity to function as moral beings, able to evaluate their behavior in light of socially accepted values. They simply do not yet know the appropriateness of behavior within the society in which they live. Instead, ten-year-olds are profoundly dependent upon their parents and their family to define for them the boundaries of the appropriate. Ten-year-olds have no independent ability to evaluate the appro-

priateness of their own behavior and thus cannot be held personally responsible for that behavior, even if it transgresses the criminal law. For that reason, condemnation of ten-year-olds makes no contribution to society's need for retribution.

As this Court has stated, "retribution as a justification for [the death penalty] . . . very much depends upon the degree of [the defendant's] culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). The "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison v. Arizona, 107 S. Ct. 1676, 1687 (1987). The ultimate sanction of death is reserved for those who engage in acts of "intentional wrongdoing" (Enmund, supra, at 800) and "purposeful . . . criminal conduct" (Tison,

supra, at 1687): those individuals who intentionally kill or who "knowingly engag[e] in criminal activities known to carry a grave risk of death." Id. at 1688. But ten-year-olds lack the ability to understand the moral implications of their behavior, and thus cannot form the "highly culpable mental state[s]" (id.) that warrant the retributive imposition of the death penalty.

Finally, the execution of a ten-year-old is not warranted by the penological justification of incapacitation. The need for incapacitation arises only if the likelihood that an offender will kill again is so great that imprisonment will not suffice to protect other people. See generally Gregg v. Georgia, 428 U.S. at 183 n.28. It is unthinkable that such a need could exist with respect to a ten-year-old. Such a child is hardly more than a hint of what he



or she will become as an adult. The potential to grow into a morally responsible, productive adult is unlimited in such a child. With positive support and education, a ten-year-old child can as fully leave behind the emotions and behaviors that led that child to kill as the butterfly leaves behind the cocoon. There simply cannot be a legitimate need to incapacitate a ten-year-old child with the finality of death. As observed by the Supreme Court of Kentucky with respect to a child older than ten:

[I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).

B. The Attributes of Childhood that Render Ten-Year-Olds Exempt from Execution Are Generally Shared by the Class of Minors Below the Age of Eighteen

In resolving the difficult question of where the Eighth Amendment draws the line between the class of clearly exempt young children and those individuals eligible for capital punishment, the foregoing analysis of the characteristics of a ten-year-old provides guidance. The line must be drawn in such a way as to reliably guard against execution of children whose impulsivity and lack of judgment render inapplicable the goals of deterrence and retribution, and whose capacity for growth renders inapplicable the goal of permanent incapacitation.

1. The Prevalence of Impulsivity and Poor Judgment Among Adolescents Below the Age of Eighteen Renders Inapplicable the Goals of Deterrence and Retribution

As the Thompson plurality noted, social scientific literature overwhelmingly supports the conclusion that adolescence is a period characterized by impulsivity and poor

judgment. Thompson, supra, 108 S. Ct. at 2699 n.43 (plurality opinion). The experience of Amici in working with adolescents amply supports these observations about the period of adolescence. The stage of developmental growth known as adolescence frequently is characterized by: impulsivity and inability to exercise self-restraint; inability to consider the future consequences of one's actions; the false confidence generated by feelings of omnipotence; inadequate judgment, in part because of the lack of sufficient life experience to provide a perspective or broader context for evaluating events; and susceptibility to the influence of peers, partly because of the lack of sufficient confidence in one's own identity.

This Court has repeatedly recognized these aspects of adolescence. For example, in Eddings v. Oklahoma, 455 U.S. 104 (1982),

the Court observed that minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage" and that adolescents "generally are less mature and responsible than adults." Id. at 115-16. Similarly, in Haley v. Ohio, 332 U.S. 596, 599 (1948), this Court referred to the "period of great instability which the crisis of adolescence produces."

The typical attributes of adolescence have an obvious bearing on the assessment of whether executions of juveniles could possibly serve the penological goals of capital punishment. Because many adolescents act impulsively without a "cold calculus . . . preced[ing] the decision to act," Gregg v. Georgia, supra, 428 U.S. at 186, they are no more subject to deterrence than are their ten-year-old counterparts. The

retribution rationale is equally inapplicable: adolescents "'deserve less punishment because [they] may have less capacity to control their conduct and to think in long-range terms than adults.'" Eddings v. Oklahoma, supra, 455 U.S. at 116 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders). The retribution rationale also is less applicable to juveniles because "'youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" Id.

2. Adolescents' Vast Capacity for Growth and Rehabilitation Renders Unjustifiable the Use of the Ultimate and Irrevocable Penalty of Death

As this Court recognized in Jurek v.

Texas, 428 U.S. 262 (1976), and again in Skipper v. South Carolina, 476 U.S. 1 (1986), the determination of the suitability of the use of the ultimate penalty of death inevitably involves a "'predict[ion] . . . [of the] convicted person's probable future conduct.'" Skipper, supra, 476 U.S. at 5; Jurek, supra, 428 U.S. at 275. Accordingly, just as Jurek approved the use of evidence that "a defendant would in the future pose a danger to the community if he were not executed . . . as . . . an 'aggravating factor' . . . [,] [Skipper held that] evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skipper, supra, 476 U.S. at 5. See also Franklin v. Lynaugh, 108 S. Ct. 2320, 2329 (1988) (describing Skipper as holding that the "defendant's likely future behavior" is a



relevant consideration in a capital sentencing determination).

While adults may have widely varying degrees of potential for rehabilitation, the class of adolescents shares a common trait of vast potential for rehabilitation. As the Thompson plurality observed, adolescence is a period marked by "capacity for growth." 108 S. Ct. at 2699. It has been the experience of amici, in working with adolescents, that they have boundless capability for change, since the personality that the individual will have as an adult is still in the process of being formed. And, precisely because adolescents are so malleable and may develop very different personalities and values as they gain experience and perspective, it is impossible to conclude definitively that a particular youth must be executed in order to incapacitate him or her

from committing future crimes. Indeed, as the following discussion will show, the social scientific literature and the experience of amici demonstrate that many violent adolescents can be rehabilitated.

Social scientific literature is replete with evidence that even the most violent adolescents are capable of dramatic change and rehabilitation. A two-year follow-up study of homicide offenders paroled from the California Youth Authority (CYA) in 1984 showed that 76.7 % of these offenders successfully completed their period of parole, while CYA parolees who had been convicted of non-homicide offenses had a parole success rate of only 41.9 %. California Youth Authority, Offender-Based Institutional Tracking System (1987). A study of chronic and violent juvenile offenders in Ohio similarly found that

approximately 60 % of youths who were charged with murder in juvenile court were not subsequently re-arrested as adults. D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, The Violent Few (1977).

The experience of Amici in working with young people confirms these social science findings on the malleability and inherent rehabilitative potential of violent youth. The populations served by amici range from extremely young, neglected children to violent delinquents on the verge of adulthood. Amici have repeatedly found that these children can be taught to adopt society's norms, precisely because juvenile crimes grow out of the "[a]dolescent[']s ... vulnerab[ility], ... impulsivi[ty], and ... [lack of] self-discipline[]." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth

Crime 7 (1978) (quoted in Eddings v. Oklahoma, supra, 455 U.S. at 115 n.11).

An examination of a few actual case histories provides the clearest possible illustration of the rehabilitative potential that even extremely violent youth possess:

(i) A girl whom we will call Dora (real name withheld to preserve confidentiality), grew up in Washington D.C., raised by parents who were drug sellers and addicts. Starting when Dora was eight years old, her parents used her as a courier in their drug trade. When Dora was fourteen-years-old, she killed her boyfriend, by shooting him in the back. When Dora was seventeen, she committed an armed robbery, in which she pistol-whipped the victim. At the age of eighteen, Dora committed another homicide, again of a boyfriend. Dora was removed from her community, and sent to a residential facility in California. She graduated successfully from the program and has remained crime-free for the past seven years. Today she is twenty-seven years old, still living in California, living with a man who is gainfully employed as the manager of a small store, and raising two children.

(ii) Kevin, a sixteen-year-old who resided in the Roxbury section of Boston, committed a series of robberies while armed with a knife. During one of these

armed robberies in 1974, he gratuitously stabbed a senior citizen. Kevin was convicted in juvenile court of armed robbery and assault and battery by means of a dangerous weapon, and then, pursuant to the procedure that prevailed in Massachusetts at the time, the Commonwealth attempted to transfer him to adult court for re-prosecution as an adult. The transfer was prevented by this Court's intervening decision in Breed v. Jones, 421 U.S. 519 (1975). Kevin was sent to a community-based non-residential treatment program for juveniles. The program provided intensive special educational services appropriate for his mild mental retardation, and provided counseling to deal with his low self-esteem, inadequate home life, and negative peer group. Kevin successfully graduated from the program after one year. Since that time, he has remained crime-free.

(iii) Michael, a fifteen-year-old boy who lived in Washington, D.C., killed his step-mother with an axe, dismembered her body and put it in the dust-bin. He was convicted in juvenile court in 1964, and sentenced to the juvenile detention facility for an indeterminate period. He remained in the facility for 4 years and was released when he was nineteen years old. While he had been incarcerated in the facility, he received a variety of rehabilitative services and, most significantly, established a relationship of trust with a recreation counselor, with whom he maintained contact even after leaving the facility. Upon returning to the community, Michael finished school and

then obtained employment in an air-conditioning installation company. He subsequently married, settled in a working class apartment project, and raised a child. As of his last contact with the recreation counselor, which occurred in 1980, he had remained crime-free and was still employed and happily married.

(iv) Edward Harrison (real name being used with consent) was seventeen years old when he committed a felony murder, shooting the victim with a sawed-off shotgun during the commission of a robbery. The crime took place in Washington D.C. in March of 1960. Eddie was charged as an adult with first-degree murder, convicted, and sentenced to death. While Eddie was on death row awaiting execution, having waived his right to appeal, it was discovered that his trial attorney had been practicing law without a license. Accordingly, Eddie's conviction was reversed and he was re-tried. He was once again convicted, but because the death penalty was no longer in effect, Eddie was sentenced to life imprisonment. The conviction was again overturned on appeal, Eddie was again re-tried and again sentenced to life imprisonment. However, during the eight-and-a-half years that Eddie had spent in prison pending appeals and re-trials, he had become involved in arranging rehabilitative programs for himself and other inmates. Through the support of prison staff and a local judge, Eddie was released pending appeal and became involved in designing rehabilitative programs for delinquent youth. His conviction was eventually upheld on



appeal, but, as a result of the progress he had achieved, his sentence was commuted by President Nixon. Since Mr. Harrison's release from prison in 1968, he has devoted his life to programs for youth. Now 45 years old, he is the executive director of a Baltimore-based program for pre-trial diversion for delinquent youth, which Mr. Harrison himself created and initiated with the aid of a federal grant, and which now is an established Maryland state program. Mr. Harrison also is the vice-chairman of the Maryland Juvenile Justice Advisory Council, and has testified before Congress on issues relating to youth and delinquency.

The same remarkable transformation that occurred in each of these cases has been replicated in numerous other cases of equally serious crimes as well as less serious crimes. The successes are usually due to the quality and creativity of the rehabilitative facility. For example, the House of Umoja in Philadelphia has experienced remarkable successes in reforming members of violent youth gangs, for more than a decade. See R. Woodson, A Summons to Life: Mediating Structures and the Preven-

tion of Youth Crime (1981); Fattah, "Call and Catalytic Response: The House of Umoja," in Violent Juvenile Offenders: An Anthology 231 (1984). The Glen Mills School in Concordville, Pennsylvania, has also had remarkable successes in reforming extremely violent delinquents, through a combination of excellent academic and vocational training and athletic programs, as well as a variety of creative measures designed to build self-esteem. For example:

Richard, a fifteen-year-old who was convicted of first-degree felony-murder in the West Virginia juvenile court, was placed in the Glen Mills School in March of 1984. During the period of almost three years that Richard remained at Glen Mills, he received special education classes and vocational training in a variety of marketable skills, and he participated in student government and varsity sports. During his final seven months at the school, Richard was placed in a day-time job in a local furniture store, where he could apply the wood-working skills he had learned at the school. Richard was released in January of 1987 and is now living with his sister in Ohio and complying with all of the

conditions of his probation. He is presently looking for employment in the furniture construction trade, and, in the interim, is working in a restaurant.

Developments in corrections policies in recent years provide the promise of continued and increased success in the reformation of violent youth. In January of 1980, the Federal Office of Juvenile Justice and Delinquency Intervention initiated a nationwide research and development effort to identify the most effective intervention strategies for rehabilitating violent juvenile offenders. See Fagan, Rudman & Hartstone, "Intervening with Violent Juvenile Offenders: A Community Reintegration Model," in Violent Juvenile Offenders: An Anthology, supra at 207-09. The preliminary results of this national research effort indicate that recidivism can be significantly reduced through a regimen of short-term confinement in a small secure facility

with intensive staff support, followed by the provision of carefully planned services upon the youth's re-entry into the community. See Krisberg, "Preventing and Controlling Violent Youth Crime: The State of the Art," in I. Schwartz, Violent Youth Crime: What Do We Know About It and What Can Be Done About It (1987). See also P. Greenwood & F. Zimring, One More Chance: The Pursuit of Promising Intervention Strategies for Chronic Juvenile Offenders (1985).

The available empirical evidence thus refutes popular assumptions about the "street-wise" or "hardened" nature of juvenile criminals. It suggests instead that adolescents, regardless of whether they committed very violent offenses or less serious crimes, are capable of rehabilitation. Thus, with respect to a crucial element of capital sentencing -- the

likelihood of commission of future crimes -- juveniles as a class are distinguishable from adults. Given the irrevocable nature of capital punishment which calls for a requirement of heightened reliability in capital sentencing, see, e.g., Lockett v. Ohio, 438 U.S. 586, 604-05 (1978), the Eighth Amendment cannot tolerate the risk of executing young persons who, with time, stand a great chance of maturing into productive members of society.

C. There Is No Constitutionally Acceptable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

Certainly it cannot be said that every person under the age of eighteen necessarily shares in precisely the same degree the qualities which typify the period of adolescence. Individual adolescents vary markedly in their degree of maturity, self-control, and judgment. The attainment of adult

levels of maturity and judgment may occur at different ages, depending upon the individual youth's prior experiences, education, and support network of parents and friends.

The question that must be resolved, then, is whether there is a principled basis for distinguishing among the class of adolescents in administering the death penalty.<sup>2</sup> As the discussion in preceding

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2/ In essence, there are three distinct issues of criminal responsibility that may arise when a child is prosecuted for a crime. The first of these is whether the child is criminally responsible at all. As Justice Scalia noted in his dissenting opinion in Thompson, the common law absolved children under the age of seven from any criminal responsibility whatsoever. 108 S. Ct. at 2714. It is evident that the common law's concept of the minimal degree of maturity necessary to be prosecuted at all is a very different consideration from the question of the degree of maturity necessary to justify the ultimate punishment of death. The second question that must be asked regarding prosecution of a child is



sections has demonstrated, children under the age of eighteen, as a class, share certain qualities that render the use of capital punishment unjustifiable. In the present section, amici will show that given the commonality of qualities such as impulsivity and poor judgment among adolescents, the only principled distinction between children and adults in the context of capital punishment is the age of majority. This conclusion is supported by the

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whether that child, once subjected to criminal liability, should be prosecuted as an adult. The third and discrete question is whether that child, having been found mature enough to be transferred to adult court for prosecution as an adult, should be exposed to the ultimate punishment of death. A positive answer to that final question necessarily requires a greater level of culpability and thus maturity than that needed to render a child criminally responsible or even subject to transfer to adult court.

"objective manifestations" of society's views -- legislative pronouncements and jury verdicts -- and also by this Court's analysis of children's rights in prior caselaw.

1. The objective manifestations of modern values militate for drawing the line at age eighteen

There are only six States that have consciously and clearly chosen to sanction the use of the death penalty for defendants who were under the age of eighteen at the time of the offense. See Thompson, supra, 108 S. Ct. at 2696 n.30. Fifteen States and the District of Columbia prohibit capital punishment of adults and juveniles alike. Twelve States, although tolerating capital punishment for adults, have consciously chosen to set the minimum age of eligibility for capital punishment at eighteen. See id. Although twenty-three more jurisdictions

fail to specify a minimum age limit for capital punishment, it can hardly be said that these jurisdictions have consciously and clearly sanctioned executions of children under the age of eighteen since, as Justice O'Connor explained in her concurrence in Thompson, there is no evidence that these States "realize[d] that [their] . . . actions would have the effect of rendering [children below the age of eighteen] . . . death-eligible or . . . [gave] the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." 108 S. Ct. at 2711.

Even more significant to the assessment of the evolution of national standards of decency is the fact that recent state legislative proceedings demonstrate a clear trend of increasing recognition of the

unconscionability of executing children. Nebraska and Ohio established prohibitions against the execution of children under the age of eighteen in 1982. See Neb. Rev. Stat. § 28-105.01 (1985); Ohio Rev. Code Ann. § 2929.02(A) (1984). Colorado and Oregon followed suit in 1985, and New Jersey in 1986. See Colo. Rev. Stat. § 16-11-103(1)(a) (1986); Ore. Rev. Stat. §§ 161.620 & 419.476(1) (1987); N.J. Stat. Ann. §§ 2A:4A-22(a) (1987) & 2C:11-3g (Supp. 1988). In 1987, the Maryland legislature joined the growing trend by also adopting age eighteen as the minimum age for capital punishment. See Md. Code art. 27, § 412(f) (1988). Thus, it seems clear that the half-dozen States that have consciously sanctioned execution of children below the age of eighteen constitute a dwindling minority.

Model legislation and criminal justice

standards also reflect a contemporary judgment to ban executions of children below the age of eighteen. The Model Penal Code, which the Court considered in gauging the constitutionality of capital punishment in Gregg v. Georgia, supra, 428 U.S. at 191, 193, recommends that children below the age of eighteen be deemed ineligible for capital punishment. See American Law Institute, Model Penal Code § 210.6 (Official Draft 1980). The National Commission on the Reform of Criminal Law similarly called for a prohibition against execution of children below the age of eighteen. National Commission on the Reform of Criminal Law, Final Report of the New Federal Code § 3603 (1971). The American Bar Association, which has never before taken a formal position on any aspect of capital punishment, adopted a resolution in 1983 opposing "the imposition

of capital punishment upon any person for any offense committed while under the age of eighteen." American Bar Association Report No. 117A (approved in August, 1983). The National Council of Juvenile and Family Court Judges similarly adopted a resolution on July 14, 1988, declaring that the Council "is opposed to capital punishment of those who committed an offense while under the age of eighteen years."

Accurate assessment of jury verdicts is complicated by the fact that prior to this Court's decision in 1982 in Eddings v. Oklahoma, supra, some states unconstitutionally prevented the sentencer in a capital proceeding from giving meaningful consideration to the youth of the defendant as a mitigating factor. Nonetheless, jury verdicts in the present decade show an overwhelming trend against capital punish-



ment when the defendant was a minor. As of December, 1983, children under age eighteen constituted only 2.9 % of the death row population of 1,289 persons. Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 384 (1986). Significantly, in the wake of Eddings, as the number of death sentences imposed upon adults has multiplied, the rate of death sentences for minors has decreased. From December 1983 to July 1986, the adult population of death row increased by 42 % (from 1,250 to 1,770), while the juvenile population decreased by 16 % (from thirty-eight to thirty-two); juveniles accounted for only 1 % of the approximately 700 death sentences imposed from December, 1983, to March, 1986. Id.

The consensus of modern values is also evident in the "climate of international

opinion.'" Enmund v. Florida, supra, 458 U.S. 796 n.22. Three major international human rights treaties expressly prohibit the death penalty for children below the age of eighteen. See International Covenant on Civil and Political Rights, Article 6(5), in Multilateral Treaties Deposited With the Secretary General of the United Nations, at 124, U.N. Doc. ST/LEG/Ser. E/3 (1985); American Convention on Human Rights, Article 4(5), in Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II, 65, Doc. 6, July 1, 1985, at 63; Geneva Convention for the Protection of Civilians in Time of War, Article 68. Over eighty nations, including the vast majority of western European countries, have either abolished the death penalty altogether or have forbidden it for children and adolescents.

Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 Cin. L. Rev. 655, 666 n.44 (1983). Even among the eighty-one nations that do permit executions of children, there were only two juveniles who were actually put to death during the decade from 1973-82. Id. at 666-67 n.44. Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under eighteen years of age." See United Nations Economic and Social Council (UNESCO), Report of the Secretary General on Capital Punishment at 10, UN. Doc. E/5242 (1973).

2. This Court's prior analyses of children's rights and disabilities also militate for treating children as a coherent class and drawing the line at age eighteen

This Court's decisions concerning the

legal rights and disabilities of minors repeatedly treat juveniles as a coherent class, without distinguishing between mature and immature minors. Significantly, in these cases, the Court did more than simply defer to legislative line-drawing. The Court in each case examined the justifications for drawing a line between childhood and adulthood, and upheld legislative actions because the Court itself concluded that minors' reduced capacity for mature decisionmaking provided a justification for treating them differently from adults.

In rejecting a challenge to the constitutionality of a statute authorizing preventive detention for juveniles, this Court in Schall v. Martin, 467 U.S. 253 (1984), employed a due process analysis that was based upon the Court's perception of the differences between childhood and adulthood.

The Court ruled that the right to liberty enjoyed by all adults is "qualified" (id. at 265) when applied to a juvenile, because "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves." Id. Without distinguishing between mature and immature minors, or between differing age groups of minors, the Court broadly concluded that juveniles' immaturity and lack of judgment justify the State in employing preventive detention to protect "'the juvenile from his own folly.'" Id. at 265; see also id. at 266.

The Court similarly applied a class-wide assumption of immaturity in Parham v. J.R., 442 U.S. 584 (1979), to reject a due process challenge to a Georgia civil commitment statute that authorized third-party commitment of children under the age of eighteen. In curtailing children's liberty

interests in this context, the Court relied upon the generalization that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." Id. at 603.

When the Court in Ginsberg v. New York, 390 U.S. 629 (1968), rejected a First Amendment challenge to a state statute prohibiting the sale of sexually explicit (albeit non-pornographic) material to minors, the Court's analysis rested upon its conclusion that the State can take steps to ensure that children "are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" Id. at 640-41. In a passage that has often been reiterated by this Court, Justice Stewart expressed the generalization that children are "not possessed of that full capacity for individual choice



which is the presupposition of First Amendment guarantees." Id. at 649-650 (Stewart, J., concurring) (footnotes omitted).

As the plurality observed in Thompson, "[i]t would be ironic if these assumptions that we so readily make about children as a class -- about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives -- were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment." 108 S. Ct. at 2693 n.23. There can be no justification for employing a "ratchet" analysis that forbids case-by-case decisionmaking for the sake of expanding juvenile rights while employing that very same form of decision-making for the sake of extinguishing the

greatest of all rights, the right to life.<sup>3</sup>

3/ The decisions addressing a young woman's privacy right to an abortion constitute the only factual context in which this Court has tolerated any line-drawing on the basis of the relative maturity or immaturity of individual youths. See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981). However, the Court has permitted line-drawing only in order to avoid irrevocable harm to mature minors. This Court struck down certain types of burdens on pregnant minors because of the "grave and indelible" consequences to a minor if she is forced to have a child. See Bellotti v. Baird, supra, 443 U.S. at 642 ("considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor"). Thus, the Court ruled that the Constitution requires States to recognize a distinction between mature and immature minors only where the deprivation of certain rights and privileges would result in "grave and indelible consequences." The present cases certainly do not fall within this exception which the Court has carved in its general approach of treating all minors as a coherent class. Unlike the

The only principled line between children and adults in the context of capital punishment is the same line that this Court has repeatedly drawn in defining the rights of minors: the age of majority. For this reason, the Court should rule that children who were below the age of eighteen<sup>4</sup> at the

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abortion cases, there are no "grave or indelible" consequences to anyone -- not the State and certainly not the minor -- in preventing minors from being executed.

- 4/ Although the States vary somewhat in the age designated as the "age of majority", virtually all States employ age eighteen. See M. Guggenheim & A. Sussman, The Rights of Young People 187, 290-91 (2d ed. 1985) (listing the age of majority for every state). This includes Georgia. See Ga. Code Ann. § 39-1-1(a) (1982). Missouri has not established a uniform age of majority; although eighteen is designated as the age of majority for most matters (see, e.g., Mo. Ann. Stat. § 431.055 (Supp. 1988) (competency to contract); Mo. Ann. Stat. § 475.010(11) (Supp. 1988) (trusts and estates); Mo. Ann. Stat. § 507.115 (Supp. 1988) (for purposes of

time of the offense cannot be executed.

## II.

ASSUMING ARGUENDO THAT THERE WERE A PRINCIPLED BASIS FOR DISTINGUISHING AMONG JUVENILES IN THE CAPITAL SENTENCING CONTEXT, THE MECHANISMS FOR DOING SO IN GEORGIA AND MISSOURI DO NOT PROVIDE A CONSTITUTIONALLY ACCEPTABLE BASIS FOR SUCH DECISIONMAKING

The plurality and the dissent in Thompson agreed that the key considerations in determining the suitability of execution for a young person are maturity and responsibility. As the following discussion will show, neither Georgia nor Missouri requires a determination of maturity or moral responsibility as a prerequisite for sentencing to death an individual whose offense was committed prior to age eighteen

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civil suits)), twenty-one is still the age of majority for some purposes (see, e.g., Mo. Ann. Stat. § 404.007(14) (Supp. 1988) (transfer of property to a minor)).

or even prior to age sixteen. Indeed, neither State even provides the minimal protection suggested by the dissent in Thompson: "a rebuttable presumption that [the defendant] . . . is not mature and responsible enough to be punished as an adult." 108 S. Ct. at 2712.

A. Although the Georgia Statute Sets a Minimum Age for Death-Eligibility, It Fails to Provide Adequate Procedural Safeguards for Minors like Petitioner Jose High Who Are Above the Statutory Minimum Age

The Georgia statutory scheme, unlike the Oklahoma statute considered in Thompson, establishes a statutory minimum age, prohibiting capital punishment for a defendant who was under the age of seventeen at the time of the offense. See Ga. Code Ann. § 17-9-3 (1982).<sup>5</sup> Under Georgia law, all

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5/ Although the State of Georgia took the

seventeen-year-olds are eligible for capital punishment.

As Part I.B of this brief demonstrated, seventeen-year-olds share many of the qualities of adolescence that render capital punishment unjustifiable for younger children. The almost universal selection of age eighteen as the age of majority in this country attests to the widespread recognition that many seventeen-year-olds are unable to exercise adult judgment. That perception of the differences between

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position for several years that the actual minimum age of eligibility for capital punishment was thirteen, see, e.g., Lewis v. State, 246 Ga. 101, 107, 268 S.E.2d 915, 920-21 (1980) (Hill, J., concurring); Hawes v. State, 240 Ga. 327, 337-41, 240 S.E.2d 833, 840-42 (1977) (concurring opinions of Hall, J., and Hill, J.), the Georgia Supreme Court made clear in Bankston v. State, 258 Ga. 188, 367 S.E.2d 36 (1988), that Ga. Code Ann. § 17-9-3 establishes an absolute minimum-age of seventeen.



seventeen- and eighteen-year-olds also is reflected in the selection of age eighteen as the minimum age of eligibility for capital punishment in most of the states that have consciously set a minimum age of death-eligibility. Even the Georgia legislature has recognized that significant developmental differences distinguish seventeen-year-olds from the class of adults whose adulthood begins on their eighteenth birthday: Ga. Code Ann. § 17-10-14 (Supp. 1987) provides that youths transferred to adult court and convicted of a crime (including a capital crime) can be imprisoned only in a juvenile facility and that placement in an adult correctional facility cannot take place until the youth reaches the age of eighteen.<sup>6</sup>

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6/ This statute provides:  
"Notwithstanding any other provisions

Yet, for defendants who are seventeen

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of this article, in any case where a person under the age of 17 years is convicted of a felony and sentenced as an adult to life imprisonment or to a certain term of imprisonment, such person shall be committed to the Division of Youth Services of the Department of Human Resources to serve such sentence in a detention center of such division until such person is 18 years of age at which time such person shall be transferred to the Department of Corrections to serve the remainder of the sentence."

Ga. Code Ann. § 17-10-14 (Supp. 1987).

The conclusion that the Georgia legislature recognized the developmental distinction between the ages of seventeen and eighteen is not inconsistent with its enactment of a statute forbidding capital punishment for crimes committed before age seventeen. This minimum-age statute expresses the legislature's determination that no child under the age of seventeen can possibly be culpable enough to warrant imposition of the death penalty. It does not, however, preclude the conclusion that the developmental differences between ages seventeen and eighteen might result in some seventeen-year-olds being too immature to be eligible for the death penalty.

at the time of the offense, the only procedural protection afforded on account of the defendant's youth is the same procedural protection afforded young adults over the age of eighteen: consideration of the youth of the defendant as a mitigating factor. See, e.g., Lewis v. State, 246 Ga. 101, 104, 268 S.E.2d 915, 919 (1980). It is evident that such a system, which treats youth as simply one mitigating factor to be weighed against aggravating factors, does not provide for specific findings of the characteristics deemed important by every member of this Court in Thompson: maturity and culpability. That conclusion is demonstrated by Enmund v. Florida, 458 U.S. 782 (1982), where, notwithstanding Florida's providing for consideration of the defendant's minor participation in the crime as a statutory mitigating circumstance, see id. at 806

(O'Connor, J., dissenting), this Court created a rule requiring that "at some point in the process, the requisite factual finding as to the defendant's culpability . . . [be] made." Cabana v. Bullock, 474 U.S. 376, 387 (1986).

In failing to provide any procedural safeguards such as a specific determination of culpability despite their youth or "a rebuttable presumption that [they] . . . are not mature and responsible enough to be punished as an adult," Thompson, supra, 108 S. Ct. at 2712 (Scalia, J., dissenting), the Georgia system insufficiently guards against execution of defendants who were immature, non-culpable seventeen-year-olds at the time of the offense. Even if this Court does not establish a categorical minimum-age of eighteen, the Court should rule at the very least that a statutory scheme such as this

violates the Eighth Amendment.

B. Missouri's Use of Transfer to Determine Death-Eligibility Suffers from the Same Flaws as the Oklahoma Scheme Considered in Thompson and Results in Irrational and Inconsistent Imposition of the Death Penalty

1. The Missouri Statute Suffers from the Same Defects that Led this Court to Strike Down the Death Sentence in Thompson v. Oklahoma

The Missouri statutory scheme for determining juveniles' eligibility for the death penalty suffers from precisely the same flaws as the Oklahoma statute considered by this Court in Thompson. In Missouri, as in Oklahoma, the death penalty statute fails to establish any minimum age. See Mo. Ann. Stat. §§ 565.020 & 565.030-565.040 (Supp. 1988). For children under the age of seventeen (the age limit for the jurisdiction of the juvenile court, Mo. Ann. Stat. § 211.021 (Supp. 1988)), eligibility for capital punishment is determined by the

process of transfer to adult court.

Missouri law authorizes transfer of children "between the ages of fourteen and seventeen [who have] . . . committed an offense which would be considered a felony if committed by an adult." Mo. Stat. Ann. § 211.071(1) (Supp. 1988). Since the capital punishment statute specifies no minimum age, any child who is transferred to adult court for a capital offense is subject to the death penalty.

In Missouri, as in Oklahoma, there is no reason to believe that the state legislature "deliberately concluded that it would be appropriate to impose capital punishment" on the children subjected to transfer to adult court. Thompson, supra, 108 S. Ct. at 2707 (O'Connor, J., concurring). Because the legislature "proceeded in this manner, there is a considerable risk



that the . . . [Missouri] legislature either did not realize that its actions would have the effect of rendering [all transferred children] . . . death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." Id. at 2711 (O'Connor, J., concurring).

A review of Missouri caselaw on transfer to adult court amply supports the conclusion that "[t]here are many reasons, having nothing whatsoever to do with capital punishment, that might [have] motivate[d] . . . [the Missouri] legislature to provide as a general matter for some [16-year-olds] . . . to be channeled into the adult criminal process," such as a legislative judgment that "[t]he length or conditions of confinement available in the juvenile system . . .

[are] inappropriate for serious crimes or some recidivists." Id. at 2707 (O'Connor, J., concurring). See, e.g., State v. Tate, 637 S.W.2d 67, 71-72 (Mo. App. 1982) (fifteen-year-old one week short of his sixteenth birthday, charged with murder, transferred to adult court; in approving transfer, appellate court stresses that it was "reasonable for the juvenile court to conclude that from a practical standpoint only two years of rehabilitative confinement was available and that based upon the crime and defendant's past history such a period was not adequate to rehabilitate defendant and more important, to protect society from him"); State v. Owens, 582 S.W.2d 366, 371, 375 (Mo. App. 1979) (primary factor in justifying transfer of fifteen-year-old charged with rape was the restriction upon the length of confinement that could be

ordered through the juvenile justice system); State v. Kemper, 535 S.W.2d 241, 250-51 (Mo. App. 1976) (although fifteen-year-old charged with murder was a first offender who had been diagnosed as suffering from mental problems which could be treated in a secure wing of a State Hospital which included adults, transfer ordered because "there was no exclusively juvenile facility available to the court which would provide the treatment which might be required by the child and still afford the security which the court deemed essential in the handling of a youth such as appellant" and because the length of confinement through the juvenile justice system would not provide sufficient time for rehabilitation).

The only factor that prevents petitioner Heath Wilkins from benefitting from the rule this Court adopted in Thompson

is of course that petitioner is sixteen, and the facts of the Thompson case did not require this Court to consider the applicability of its holding to children over the age of fifteen. The evidence of a national consensus against execution of sixteen-year-olds is virtually as strong as the evidence considered by this Court in Thompson with respect to fifteen-year-olds, and certainly strong enough to justify the type of precaution adopted in Thompson. Fifteen of the eighteen states that have specified a minimum age for capital punishment prohibit execution of sixteen-year-olds.<sup>7</sup> Thus, only three state legislatures in this country

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7/ The only states that have established a minimum-age of sixteen are: Indiana (Ind. Code Ann. § 35-50-2-3 (Supp. 1987)); Kentucky (Ky. Rev. Stat. Ann. § 640.040(1) (1986)); and Nevada (Nev. Rev. Stat. § 176.025 (1987)).

have expressly and consciously chosen to classify persons who committed an offense while sixteen as eligible for the death penalty. Jury verdicts of death in cases in which the defendant was sixteen at the time of the crime appear to be almost as rare as verdicts of death for fifteen-year-olds.

See Streib, supra, at 384-86. Finally, the social scientific evidence shows that sixteen-year-olds share with fifteen-year-olds and younger children the qualities of impulsivity, lack of judgment, and potential for change that render inapplicable the societal purposes for the death penalty. See Part I supra.

Accordingly, even if the Court does not create a categorical minimum-age limit of eighteen, as amici have urged in Part I of this brief, the Court should, at the very least, strike down petitioner Heath Wilkins'

death sentence on the ground that it was imposed "under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution."

Thompson, supra, 108 S. Ct. at 2711

(O'Connor, J., concurring).

2. By Relying on Transfer as a Mechanism for Determining Eligibility for Capital Punishment, the Missouri Statute Results in "Freakish" and Unusual Application of the Death Penalty

There is a second and independent reason for finding that Missouri's statutory mechanism for determining eligibility for capital punishment violates the Eighth Amendment. The transfer system in Missouri is so unrelated to the necessary inquiry in capital punishment cases that its use as the determinant for death-eligibility results in freakish and unusual application of the death penalty.



The plurality, concurrence, and dissent in Thompson agreed that the critical consideration in determining juveniles' eligibility for capital punishment must be maturity. But Missouri transfer caselaw reveals that maturity is not the central determinant of which children are transferred to adult court and rendered eligible for capital punishment. See, e.g., State v. Mouser, 714 S.W.2d 851, 858 (Mo. App. 1986) (sixteen-year-old charged with capital murder transferred despite evidence of "immaturity and tendency to make decisions emotionally rather than intellectually" and despite lack of criminal history, because defendant was intellectually average and because the rehabilitative facilities available through the juvenile court were not "sufficiently secure and available").

As demonstrated in the previous

section, transfer in Missouri is frequently predicated on the need for a longer period of rehabilitation than could be provided through the juvenile justice system. But the need for longer rehabilitation (which necessarily encompasses an assessment that the individual is amenable to rehabilitation) not only fails to further the inquiry necessary for death-eligibility; it is directly inconsistent with the use of capital punishment.

Thus, Missouri's transfer system does not ask the questions necessary for rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, supra, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). The factors that render a child transferable and thus death-

eligible bear no connection whatsoever to the considerations that this Court has deemed relevant to capital punishment. In short, the use of transfer as a mechanism for defining the death-eligible population of children renders the death penalty "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, supra, 408 U.S. at 309 (Stewart, J., concurring).

#### CONCLUSION

Amici respectfully submit that a society bounded by an injunction not to inflict cruel and unusual punishment, as measured by evolving standards of decency, should recognize as a categorical rule of law that no person may be executed for an offense committed while under the age of eighteen years. Amici urge this Court to reverse the judgments of the Supreme Courts

of Georgia and Missouri insofar as they uphold the imposition of petitioners' sentences of death.

Dated: New York, New York  
August 31, 1988

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1987

**JOSE MARTINEZ HIGH,**  
*Petitioner,*

vs.

**WALTER ZANT,**  
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

**HEATH A. WILKINS,**  
*Petitioner,*

vs.

**STATE OF MISSOURI,**  
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF MISSOURI

**BRIEF FOR AMICUS CURIAE  
AMNESTY INTERNATIONAL  
IN SUPPORT OF PETITIONERS**

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**BRIEF FOR AMICUS CURIAE  
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## BRIEF OF AMNESTY INTERNATIONAL

### INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Amnesty International ("AI"), with the consent of the parties.<sup>1</sup>

Amnesty International is an independent international human rights organization which (1) seeks the release of "prisoners of conscience" -- men and women detained anywhere because of their beliefs, color, sex, ethnic origin, language or religious creed, provided they have not used or advocated violence; (2) works for fair and prompt trials for all political prisoners and on behalf of such people detained without charge or trial; and (3) opposes the death penalty and torture or other cruel inhuman or degrading

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<sup>1</sup> The parties' letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.



treatment or punishment of all prisoners without reservation. AI acts on the basis of the Universal Declaration of Human Rights and other international human rights instruments. Amnesty International opposes the death penalty unconditionally, believing it to be the ultimate cruel, inhuman and degrading punishment and a violation of the right to life, as proclaimed in the Universal Declaration and other international human rights instruments.

Amnesty International was founded in London in 1961 and now has sections in forty-four countries (in Africa, Asia, the Americas, Europe and the Middle East), including the United States, with more than 700,000 individual members, subscribers and supporters in 150 countries. There are more than 3,800 local AI groups in more than 60 countries

working in support of all aspects of AI's mandate. Since Amnesty International was founded AI groups have intervened on behalf of more than 25,000 prisoners in over a hundred countries with widely differing ideologies. In 1977, AI received the Nobel Prize for its work.

Amnesty International has formal consultative status, or similar formal relations, with the United Nations, UNESCO, the Organization of American States, the Council of Europe and the Organization of African Unity.

In February 1987, AI initiated a worldwide campaign urging states within the United States which retain the death penalty to abolish it. The campaign was based upon a 240-page report which discusses all aspects of the death penalty as implemented in the United States, including the execution of

juvenile offenders. United States of America: The Death Penalty, at 65-75 (February 1987).

Amnesty International does not approve of and would not defend any violent crime. However, AI regards the death penalty -- particularly as applied to crimes committed by juvenile offenders-- as cruel, inhuman and degrading treatment and incompatible with respect for the inherent dignity of the human person.<sup>2</sup>

With respect to the execution of juvenile offenders,<sup>3</sup> there exists a well developed, unequivocal international

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<sup>2</sup>Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.")

<sup>3</sup> The term "juvenile," "child" or "juvenile offender" as used in this brief refers to a person who was under 18 at the time they committed their crime in accordance with the internationally recognized legal standards described in this brief.

legal and moral consensus prohibiting all nations from executing juvenile offenders for their crimes. However heinous the crime, the imposition on a young person of a sentence of utmost cruelty, which denies the possibility of rehabilitation or reform, is contrary to contemporary standards of justice and humane treatment in every corner of the world.

AI filed an amicus curiae brief last Term in Thompson v. Oklahoma. This brief is similar in substance to the brief filed in the Thompson case; however, it includes additional, updated information about international law and practices relating to the execution of juvenile offenders.

In the past two years AI has learned about a significant number of additional countries from different regions of the

world which have incorporated the prohibition against juvenile execution in their national legislation. These countries include Bahrain, Belize, Cuba, Ethiopia, Greece, Guinea, Kenya, Liberia, Malawi, Niger, Oman, Republic of China (Taiwan), Saudi Arabia, Sierra Leone, Swaziland, Syria, Tanzania, Yugoslavia and Zambia. Moreover, since AI filed its brief in the Thompson case in May 1987 the only reported executions of juvenile offenders are unconfirmed reports of such executions in Iraq on two occasions.

Hence, the evidence upon which AI's amicus curiae brief in the Thompson case was based is even more overwhelming in support of the international standard against juvenile execution at this time.

#### SUMMARY OF ARGUMENT

In this brief, Amnesty International,

based on its knowledge of national practices regarding the execution of juvenile offenders and its participation since 1961 as an observer in the development of international legal standards in this area, presents a summary of the massive evidence showing that there is a well established internationally recognized legal standard prohibiting the execution of juvenile offenders who were under 18 at the time of their crimes. This evidence includes widely ratified multilateral treaties and the laws and practices of almost all of the nations of the world.

The evidence of international consensus on this issue is overwhelming. Virtually every nation in the world, including the United States, has ratified treaties which prohibit the execution of juvenile offenders in some circumstances (e.g.,



during wartime). The majority of nations have ratified treaties which prohibit the execution of juvenile offenders in all circumstances. Even those countries which retain the death penalty have almost uniformly rejected the practice of juvenile execution as a violation of international standards of law and morality. There have also been numerous additional international expressions of the prohibition against the execution of juvenile offenders in the work of various international bodies. Moreover, the United States has been an active participant in these developments for decades and has never objected to the development of these internationally recognized legal standards prohibiting the execution of juvenile offenders.

Amnesty International hopes and expects that the body of internationally

recognized legal standards and opinion will be considered with great seriousness by this Court in determining whether the execution of Heath A. Wilkins or Jose Martinez High for crimes committed when they were below eighteen years of age, would violate the Eighth Amendment's prohibition against cruel and unusual punishment. The international community has achieved a consensus on this question which is highly relevant to this Court's Eighth Amendment analysis under Trop v. Dulles, 356 U.S. 86, 101 (1958), and its progeny. See, e.g., Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, J., plurality opinion); Coker v. Georgia, 433 U.S. 584, 586 n. 10 (1977); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982).

In Thompson v. Oklahoma, \_\_\_U.S.\_\_\_\_,

108 S.Ct. 2687 (1988), a plurality of this Court found that the international consensus prohibiting the execution of juvenile offenders supported the growing consensus in the United States against this practice in the context of a person who was 15 at the time of his crime. 108 S.Ct. at 2689, 2696. The same international standard supports the conclusion that the execution of persons who were 16 or 17 at the time of their crimes is cruel and unusual punishment.

In the past decade only a handful of juvenile offenders have been executed by governments in the world. Since 1979 out of the thousands of executions recorded by Amnesty International, only eight were reported to have been executions of juvenile offenders. These executions occurred only in Bangladesh, Barbados, Pakistan (two), Rwanda and the United

States (three). There have also been unconfirmed reports of executions of juvenile offenders in Iraq and Iran in recent years. Indeed, with the possible exception of unconfirmed juvenile executions in Iraq, there has been no recorded execution of a juvenile offender in the world since the execution of Jay Kelly Pinkerton in Texas on May 15, 1986. These "unusual" events stand against a nearly universal consensus of the international community that the execution of juvenile offenders violates internationally recognized legal standards and is offensive to contemporary international norms of moral decency.

The fact that the execution of juvenile offenders conflicts with internationally recognized legal standards deserves to be given particular weight in this Court's

constitutional analysis. It would be regrettable if constitutional guarantees under the United States Constitution were to be found to provide significantly less protection than the protection afforded by international norms on important issues of human rights and fundamental freedoms. The issue of whether juvenile offenders may be put to death is just such a fundamental human rights issue for the United States and for the international community. Amnesty International urges this Court to recognize the significance of the position taken by the international community on this issue by preventing the execution of Heath A. Wilkins and Jose Martinez High under the Eighth Amendment of the United States Constitution.

## ARGUMENT

### I.

#### INTERNATIONALLY RECOGNIZED LEGAL STANDARDS AND NATIONAL PRACTICES SUPPLY COMPELLING EVIDENCE THAT THE EXECUTION OF JUVENILE OFFENDERS CONSTITUTES CONSTITUTIONALLY PROSCRIBED CRUEL AND UNUSUAL PUNISHMENT

#### A. This Court Has Looked to Internationally Recognized Legal Standards and the Practices of Other Nations to Determine the Meaning of "Cruel and Unusual Punishment" Under the Eighth Amendment

As this Court recognized in 1910, the Eighth Amendment prohibition against cruel and unusual punishment "is not fastened to the obsolete." Weems v. U.S., 217 U.S. 349, 378 (1910). A half-century later, this Court again emphasized that the Eighth Amendment "must derive its meaning from evolving standards of decency that mark the progress of a maturing society." Trop v.



Dulles, 356 U.S. 86, 101 (1958).

As befits a nation mindful of its place within the international community, the plurality opinion in Trop did not rely solely upon American society as its benchmark for determining "evolving standards of decency" for this purpose. In Trop, the fact that the overwhelming majority of nations did not employ denaturalization as a punishment for desertion was a significant factor in this Court's decision. Trop, supra, 356 U.S. at 102-03.

International standards are now an established aspect of Eighth Amendment analysis,<sup>4</sup> particularly regarding limits on the use of executions as a penalty.

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<sup>4</sup>See also, Lareau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980), modified on different grounds, 651 F.2d 96 (2d Cir. 1981); Sterling v. Cupp, 20 Or. 611, 625 P.2d 123 (1981), for the application of this principle in a different context.

In Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977), for instance, this Court noted that as of 1965 only three major nations in the world retained the death penalty for rape. That international perspective informed the Coker decision that the imposition of the death penalty for the rape of an adult woman is "cruel and unusual" within the meaning of the Eighth Amendment. Id.

In Enmund v. Florida, 458 U.S. 782, 796 n. 22 (1982), this Court again turned toward the "climate of international opinion" as one basis for the determination that imposition of a death sentence upon a defendant who had not intended to kill is cruel and unusual punishment. Id. In Enmund this Court looked particularly to the practices of countries in Europe and of countries currently or formerly in the British

Commonwealth. Id.

In Thompson v. Oklahoma, supra, a plurality of this Court recognized the relevance of international standards and practices regarding the execution of juvenile offenders in interpreting the Eighth Amendment to prohibit the execution of an offender who was 15 at the time of his crime. 108 S.Ct. at 2696. The evidence of international standards and practices relied upon by the plurality in Thompson is equally compelling in the context of the execution of offenders who were 16 or 17 at the time of their crimes. The international community has clearly fixed the age of 18 as the dividing line between juvenile and adult offenders for the implementation of the death penalty.

As the plurality in Thompson recognized, the force of international

practice and opinion is even stronger against executions for crimes committed by juvenile offenders than it was for rapes (in Coker) or for unintended killings (in Enmund). The laws and practices of other nations as well as numerous international treaties, declarations and resolutions, demonstrate that evolving standards of decency of a maturing international community prohibit the execution of juvenile offenders, including the petitioners before the Court in these cases.

When this Court recognized nearly 30 years ago in Trop that the United States Constitution -- and in particular the Eighth Amendment -- cannot be interpreted in isolation from international legal standards and practices, the movement toward an international system for the protection of international human rights

was in its early stages. International human rights law has now become an established, essential and universally accepted part of the life of the international community. L. Henkin, Introduction, in "The International Bill of Rights," at 1 (1981). Individuals, including the people of the United States, are now understood to possess remediable rights based on international law. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).<sup>5</sup>

Justice Scalia's dissent in Thompson, 108 S.Ct. at 2711, criticized the reliance on international standards and practice for any purpose in the interpretation of the Eighth Amendment.

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<sup>5</sup> See generally, Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555 (1984); See also Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal 1987).

This view appears to be at variance with the Eighth Amendment jurisprudence of this Court and with the history of the application of international law generally by United States courts.<sup>6</sup>

Some benchmark exterior to the challenged penal legislation itself must guide the interpretation of the Eighth Amendment if that provision is to have any enforceable meaning. Nothing in logic, history or the jurisprudence of this Court suggests that the practices and standards of the international

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<sup>6</sup> As the Second Circuit, echoing the words of this Court in The Paquete Habana, 175 U. S. 677, 700 (1900), emphasized in Filartiga v. Pena-Irala, supra:

[T]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became part of the common law of the United States upon the adoption of the Constitution. 630 F.2d at 886.



community must be ignored in framing that benchmark.

The text, history and jurisprudence of the Eighth Amendment are uniquely well suited to the consideration of evolving standards of decency around the globe. Even if it were the case that the United States would ignore international consensus where a conflict between international and domestic standards is clear, the issue before this Court does not present such a clear conflict. The execution of juvenile offenders appears to have only a tenuous hold on American society.<sup>7</sup> Clearly, American society is

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<sup>7</sup> This is reflected by the fact that there has been only one death judgment involving a juvenile offender in the United States since early 1987. The only such sentence appears to be the death sentence imposed on Bernell Hegwood in Florida in 1988. Streib, "The Imposition of Death Sentences for Juvenile Offenders, January 1, 1982, Through June 24, 1988." (Unpublished Memorandum, June

moving toward the strong international consensus that already exists on this issue.

The United States has played an important role in fostering the development of international human rights law in the past half century.<sup>8</sup> In particular, the United States participated, without protest, in the development over the past forty years of an international norm prohibiting the execution of juvenile offenders. See generally, Hartman, The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U.

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24, 1988)

<sup>8</sup> In the past 15 years Congress has incorporated international human rights standards in dozens of laws. This legislation is collected in Human Rights Documents: Compilation of Documents Pertaining to Human Rights, Committee on Foreign Affairs (September 1983), at 24-58.

Cinn. L. Rev. 655, 682-686 (1983).

It would be a matter of grave regret to the international community if the massive evidence of laws and practice throughout the world prohibiting executions for crimes committed by juvenile offenders and the treaties condemning such executions were to be ignored in the interpretation the Eighth Amendment of the United States Constitution in these cases. The global outcry against executions for crimes committed by juvenile offenders has risen to the strength of an internationally recognized standard which should be respected by the United States and all other countries in the world.

B. Internationally Recognized Legal Standards and National Practices Condemn the Punishment of Death for Crimes of Juvenile Offenders

In this section Amnesty International

presents the evidence that internationally recognized legal standards prohibit execution of juvenile offenders. Evidence of such standards, even emerging standards, is precisely the type of evidence entitled to persuasive weight under Trop, Coker, and Enmund and Thompson. Amnesty International urges this Court to give great weight in its Eighth Amendment analysis to the overwhelming consensus of international standards and practices on this issue.

1. National Laws and Practices

144 countries, including almost all Western European countries, either have abolished the death penalty for all offenses, or have forbidden it for ordinary criminal offenses, or have excluded it for certain offenders,

including juvenile offenders.<sup>9</sup> Significantly, these nations range widely in political, regional and cultural diversity.

Thirty-four countries have completely abolished the death penalty. Twenty additional countries provide for the death penalty only for exceptional crimes such as crimes under military law, or for crimes committed under exceptional circumstances. Sixty-five of the countries which retain the death penalty for common crimes have statutory provisions recognizing juvenile offenders as exempt from the death

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<sup>9</sup> A list of all retentionist and abolitionist nations is included in the Appendix at A-1 through A-7. Retentionist countries that have prohibitions against the execution of juvenile offenders in their national legislation are identified in the Appendix at A-3 through A-7.

penalty.<sup>10</sup>

Twenty-five of the remaining sixty-one retentionist countries have ratified the International Covenant on Civil and Political Rights or the American Convention on Human Rights both of which prohibit the execution of persons who were under 18 at the time of their crimes. Thus, only thirty-six countries out of the 180 countries and territories listed in the Appendix have not formally abolished execution for juvenile offenders either in their national legislation or by ratifying a treaty prohibiting this practice. In the vast majority of these countries there has not been an execution of a juvenile offender for more than a decade. Only five

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<sup>10</sup> See Appendix, at A-3 to A-7. These statistics are taken from information in AI's files. See also, Hartman, supra, at 666 n. 44.



countries, with the possible addition of Iran and Iraq, have actually engaged in this universally condemned practice in the past decade. Significantly, the vast majority of countries which retain the death penalty have embraced the international consensus that the execution of juvenile offenders violates basic principles of humanity and decency in the international community.

In the United States 26 of 51 jurisdictions, including the District of Columbia, expressly prohibit the execution of juvenile offenders.<sup>11</sup> Thus, in more than half of U. S. jurisdictions the juvenile offenders before this Court would be ineligible for the death

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<sup>11</sup> The information about death penalty legislation in U.S. jurisdictions is taken from footnotes 25, 26, 29 and 30 in Thompson. 108 S.Ct. at 2694-96.

penalty.

In 19 other jurisdictions there is no minimum age specified in the death penalty statute. Without such an explicit legislative judgment on this fundamental question it cannot be said that these states have deliberately chosen to reject the international standard prohibiting juvenile executions. 108 S. Ct. at 2706 (O'Connor, J., concurring). Only six jurisdictions have specifically set a minimum age for the death penalty which is contrary to the international standard described in this brief.<sup>12</sup>

The key point is that there does not appear to be a political consensus in the

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<sup>12</sup> These six jurisdictions are Georgia (age 17), Indiana (age 16), Kentucky (age 16), Nebraska (age 16), North Carolina (age 17) and Texas (age 17). 108 S. Ct. at 2696 n.30.

United States in favor of the execution of juvenile offenders who were under 18 at the time of their crimes. In fact, the evidence strongly suggests a movement toward the international consensus in opposition to this practice. This growing consensus is underscored by the declarations of various representative American legal bodies, including the American Law Institute and the American Bar Association, which have publicly opposed the execution of juvenile offenders.<sup>13</sup>

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<sup>13</sup> American Law Institute Model Penal Code § 210.6 commentary at 133. (Official Draft and Revised Comments (1980) ("Civilized societies will not tolerate the spectacle of execution of children...") American Bar Association, summary of Action of the House of Delegates 17 (1983) Annual Meeting) ("Be it resolved, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18).")

While some nations still retain the possibility of executing juvenile offenders in their laws, the actual practices of nations indicate that the execution of juvenile offenders is exceedingly rare. Although 81 nations reportedly performed executions between 1973 and 1982, only two juvenile offenders were reported to have been executed during that period.<sup>14</sup> Moreover, the Secretary-General of the United Nations noted in 1973 that "[t]he great majority of Member States [of the United Nations] report never condemning to death

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<sup>14</sup> Hartman, supra, at 666-67 n. 44. This data is based on the reports of more than 70 nations to the United Nations for the period in question. In addition, one non-reporting country is known to have carried out the execution of a juvenile offender in 1982.

persons under 18 years of age."<sup>15</sup>

Amnesty International has collected data showing that since 1979 there have been more than 11,000 judicially sanctioned executions in over 80 countries; however, only eight persons who committed their offense while under the age of 18 were known to have been executed during that period. Five of these executions took place in: Pakistan (two), Barbados, Bangladesh and Rwanda (one each). The other three took place in the United States: Charles Rumbaugh (executed in Texas September 11, 1985, after dropping his final appeals), James Terry Roach (executed in South Carolina January 10, 1986) and Jay Pinkerton (executed in Texas May 15, 1986). There

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<sup>15</sup> United Nations Economic and Social Council, Report of the Secretary General on Capital Punishment at 10, U.N. Doc. E/5242 (1973).

are also unconfirmed reports of executions of juvenile offenders in Iraq and Iran. In the rest of the world, as in the United States,<sup>16</sup> being put to death for a crime committed as a juvenile is indeed "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

2. Major Human Rights Treaties Prohibit The Execution of Juvenile Offenders

The repugnance around the world towards executions for crimes committed by children has elevated this question beyond national reform into the arena of international concern and action.

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<sup>16</sup>See Streib, Death Penalty for Juveniles, Indiana University Press, (1987), at 55-71. H. Bedau (ed.), the Death Penalty In America 52-56 (1964); J. Laurence, the History of Capital Punishment 16-18 (1960).



Numerous international treaties and resolutions, declarations and other international documents reflect the international consensus against execution of juvenile offenders who were under 18 at the time of their crime. See N. Rodley, The Treatment of Prisoners Under International Law at 186 (1987). At least three major human rights treaties explicitly prohibit the imposition of the death penalty on juvenile offenders who were under 18 at the time of their crimes.<sup>17</sup>

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<sup>17</sup> American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, Doc. 65 Rev. 1 Corr. 2 (1970), Art. 4(5); International Covenant on Civil and Political Rights, Art. 6(5), Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365, § 75 U.N.T.S. 287, Art. 68

Protocol No. 6 to the European

The United States has ratified one of these treaties and has signed the other two. The fact that the United States has not yet ratified either the International Covenant on Civil and Political Rights or the American Convention on Human Rights does not dilute the binding force of the norms in these treaties which are part of customary law. In fact, the assumption of the drafters of both of these human rights treaties was that the prohibition against juvenile execution embodied in the treaties was already an accepted international standard. See §§ b and c, infra.

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Convention of Human Rights, ratified by ten nations and signed by all but six of the twenty-one Member States of the Council of Europe, abolishes the death penalty entirely for crimes during peacetime. Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114, reprinted in 22 I.L.M. 539 (1983).

a. Fourth Geneva Convention

The almost universally ratified Fourth Geneva Convention of 1949, concerned with the protection of civilians in time of war, prohibits the execution of juvenile offenders in the context of war-- perhaps the most threatening period in any nation's existence. Article 68 of the Fourth Geneva Convention provides:

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense.<sup>18</sup>

The ratifying countries of the Geneva Convention -- 165 nations, including the United States -- virtually cover the

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<sup>18</sup>The two additional Protocols to the Geneva Conventions of 1949, adopted in 1977, both rule out the death penalty for crimes committed by juvenile offenders. Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 76; Geneva Protocol II Additional to Geneva Conventions of August 12, 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts, Article 6. The United States has signed both additional Protocols. In January, 1987, President Reagan announced that the United States would not ratify additional Protocol I; however, this action was taken for reasons other than the provisions of Article 76. Message From the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-international Armed Conflicts concluded at Geneva on June 10, 1977, 100th Cong., 1st Sess., Treaty Doc. 100-2 (1987).

globe.<sup>19</sup> Thus, the United States has been a part of the development of the international norm against juvenile execution for nearly 40 years. If nearly all the nations of the world, including the United States, have agreed to prohibit the execution of juvenile offenders during periods of international armed conflict, this internationally recognized standard ought to apply with even greater force during peacetime.

b. International Covenant on Civil and Political Rights

Article 6(5) of the International Covenant on Civil and Political Rights, declares:

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<sup>19</sup> The only nations which have not ratified the Geneva Conventions are Bhutan, Brunei, Burma, Maldives and Nauru. Kiribati has also not ratified the Conventions but they remain applicable to it by virtue of a provisional declaration of application of the treaties.

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall be not carried out on pregnant women.

Eighty-seven nations of the world, including most of the Western European countries and Canada, have ratified this Covenant. Another seven nations, including the United States, have signed it.<sup>20</sup>

The debates surrounding the adoption of Article 6 of the International Covenant on Civil and Political Rights demonstrate that no opposition arose against the view that permitting executions of juvenile offenders was contrary to human rights principles.<sup>21</sup> The travaux preparatoires reveal that the drafters of Article 6

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<sup>20</sup> The nations which have ratified or signed the Covenant are identified in the Appendix.

<sup>21</sup> Hartman, supra, at 671-72.



believed that the prohibition against the execution of juvenile offenders represented a consensus of nations and never questioned the validity of this consensus.<sup>22</sup>

In fact, the travaux make clear that the Article 6(5) prohibition was no more than the codification of an already existing binding norm.<sup>23</sup> The U.N. General Assembly resolution which recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States, not only ratifying states,<sup>24</sup> is further

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<sup>22</sup> Id. at 672 and n. 64, and citations noted therein.

<sup>23</sup> Id.

<sup>24</sup> Id. at 681 n. 94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Although the United States did not participate in the Article 6 debates, it did support this General Assembly resolution. Id. at 685, 684 n. 106, 681 n. 94.

evidence of State practice supporting the position that the prohibition against the execution of juvenile offenders is an internationally recognized legal standard.

c. American Convention on Human Rights

Article 4(5) of the American Convention on Human Rights<sup>25</sup> also prohibits the executions contemplated in these cases:

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.<sup>26</sup>

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<sup>25</sup> This treaty has been ratified by nineteen American States and signed by an additional three countries, including the United States. A list of nations which have ratified or signed the American Convention is included in the Appendix.

<sup>26</sup> On March 27, 1987, the Inter-American Commission on Human Rights of the Organization of American States held that the United States violated Article 1 (right to life) and Article 2

The drafters of the American Convention, recognizing that total abolition of the death penalty was not possible in the context of the Convention, imposed important limitations on the use of executions, including the prohibition of the execution of juvenile

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(prohibition of discrimination) of the American Declaration on the Rights and Duties of Man by permitting the execution of juvenile offenders. OAS IACHR Res. 3/87, Case No. 9647, (Roach and Pinkerton v. United States), OEA Ser. L/V/II 69, Doc. 17 (March 27, 1987). The Commission stated in dictum that there was a peremptory norm of international customary law prohibiting the execution of juvenile offenders. *Id.* at Para. 56. Although the Commission did not find that age 18 was the universally accepted dividing line between juvenile and adult offenders for this purpose, it did state that there was an "emerging" norm setting the age of 18 as the minimum age for the imposition of the death penalty. *Id.* at Para. 60. This decision did not address Article 4(5) of the American Convention because the United States has not yet ratified the Convention.

offenders.<sup>27</sup> Moreover, the draft proposal of Article 4(5) was patterned after the International Covenant's prohibition on the executions of juvenile offenders, thus demonstrating a belief that such a prohibition constituted the prevailing international standard.<sup>28</sup>

The travaux of the American Convention indicate that the United States' delegation did not oppose per se the notion that the execution of juvenile

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<sup>27</sup> Although the motion for total abolition of the death penalty did not carry, no vote was cast against it. T. Buergenthal & R. Norris, Human Rights: The Inter-American System (1982), at 248, Booklet 12. The Rapporteur noted that the drafters acted according to the "trend in the Americas toward eliminating [capital] punishment". Report of the Rapporteur of Committee I. *Id.* at 162. A number of delegations also expressed hostility toward any use of the death penalty. See Minutes, 3d Session of Committee I, *id.* at 36-38.

<sup>28</sup> See, Hartman, supra, at 672-73 n. 66, and the sources cited therein.

offenders should be prohibited. Rather the United States delegation appeared more concerned that setting specific age limits on the exercise of the death penalty did not adequately take into account the "already apparent" trend toward gradual abolition of the death penalty. The U.S. stated:

The proscription of capital punishment within arbitrary age limits presents various difficulties in law, and fails to take account of the general trend, already apparent, for the gradual abolition of the death penalty... For this reason we believe the text will be stronger and more effective if this paragraph is deleted. [Emphasis added.]

Observations and Proposed Amendments to the Draft of the Inter-American Convention on the Protection of Human Rights, T. Buergenthal and R. Norris, supra, Booklet 13, at 152.

d. These Treaties Reflect an International Consensus Against The Execution of Juvenile Offenders

The Fourth Geneva Convention, the International Covenant on Civil and Political Rights, and the American Convention, along with their travaux preparatoires provide strong evidence that there exists a high degree of consensus among a large number of nations that the execution of juvenile offenders is forbidden under international law.

Under both the International Covenant on Civil and Political Rights (Article 4(2)), and the American Convention on Human Rights (Article 27(2)), the prohibitions against the execution of juvenile offenders admit of no derogation



even during national emergencies.<sup>29</sup> The United States Government has ratified the Geneva Conventions and has signed but not

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<sup>29</sup> Likewise, under Article 3 of Protocol No. 6 to the European Convention on Human Rights, no derogation from the Protocol is allowed nor may reservations in respect of the Protocol be made under its Article 4. Recently, the European Parliament passed a resolution (Doc. B 2-220/85) calling upon all Council of Europe and European Community Member States who had not yet adhered to the Protocol to do so as soon as possible. The resolution welcomed "the continuing trend towards abolition of the death penalty in Member States of the European Community" and noted that "the death penalty is a form of cruel, inhuman and degrading punishment and a violation of the right to life, even when scrupulous legal procedures are followed." Report on the abolition of the death penalty and accession to the Sixth Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1985-86 Eur.Doc. A2-167/85 at 10 (1985). In September 1987 the European Community passed a resolution in which is expressed its "deep concern" that "in 26 states (of the United States) persons under 18 can be sentenced to death..." Resolution of the European Parliament, "Political Relations between the European Community and the United States," Eur. Doc. A2-105/87 (September 16, 1987), para 16 at 20.

yet ratified the two other conventions.<sup>30</sup> The fact that the United States has not yet ratified the Covenant or the American Convention does not in any way suggest that the United States is not bound by the norm prohibiting juvenile execution.

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<sup>30</sup> President Carter sent the International Covenant and American Convention, and two other treaties, to the Senate for its advice and consent on February 23, 1978. Human Rights Treaties, President's Message to the Senate, 14 Weekly Comp. Pres. Doc. 395 (Feb. 27, 1978). Although the President proposed reservations to the American Convention and the International Covenant upon their transmittal to the Senate, the Administration noted that the reservations were intended simply to avoid criticisms and implementation difficulties and "certainly not the preservation of any right to execute children or pregnant women, something never done in the United States." Response by the Department of State to the "Critique of Reservations to the International Human Rights Covenants" by the Lawyers Committee for International Human Rights, International Human Rights Treaties: Hearings before the Committee on Foreign Relations, 96th Cong., 1st Sess. 1, 55 (1979), noted in Hartman, supra, at 685 and n. 112.

On the contrary, these treaty prohibitions provide important and authoritative evidence of the international consensus against the execution of juvenile offenders.

3. Repeated Actions by the United Nations Condemn The Execution of Juvenile Offenders

The actions of the United Nations provide further evidence of the norm prohibiting the execution of juvenile offenders. The U.N. Economic and Social Council (ECOSOC) has adopted, pursuant to a resolution, safeguards relating to the death penalty, one of which was a prohibition against the execution of persons who committed crimes below the age of 18 years. E.C.S. Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984). The U.N. General Assembly has endorsed these safeguards and asked the Secretary-General "to

employ his best endeavors in cases where the safeguards . . . are violated." G.A. Resolution 39/118, U.N. Doc. A/39/51, at 211, Oper. paragraphs 2 and 5 (1984).

In September 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, endorsing the ECOSOC safeguards and urging all states retaining the death penalty to implement them. The U.S. joined in the consensus on this resolution. Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) U.N. Doc. A/Conf.121/22 (1985), at 86-87. Indeed, the ECOSOC safeguards have become universally accepted minimum standards regarding the implementation of the death penalty.

Similarly, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), also adopted by the Seventh Congress and the United Nations General Assembly without dissent by the United States, provide: "Capital punishment shall not be imposed for any crime committed by juveniles." G.A. Res 40/33, Nov. 29, 1985, Annex, rule 17.2.

These repeated expressions of the international consensus in opposition to the execution of juvenile offenders who were under 18 at the time of their crimes leaves no room for doubt about the international obligations of the United States on this fundamental issue. The members of the international community have an expectation that all countries, including the United States, will refrain from executing juvenile offenders even in

countries which retain the death penalty for adult offenders.

#### CONCLUSION

"Children have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring), repeated in Eddings v. Oklahoma, 455 U.S. 104, 116 n. 12 (1982). As this Court emphasized in Eddings, "... youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. This Court and state and federal legislatures throughout the United States have frequently recognized that minors, especially in their early years, generally are less mature and responsible than adults. Thompson, 108 S.Ct. at 2692-93. Particularly 'during the formative years



of childhood and adolescence, minors often lack the experience, perspective and judgment' expected of adults. Even the normal 16 year old customarily lacks the maturity of an adult." Id. at 116, citing Bellotti v. Baird, 443 U.S. 622 (1979).

Violent crime is a serious problem in nearly every nation. The universal truth of Justice Frankfurter's observation in May v. Anderson, however, is equally transcendent over national boundaries. With a handful of notorious exceptions, the laws, practices and treaties of the nations of the world reflect this truth by prohibiting the penalty of death for crimes committed by children.

These internationally recognized legal standards prohibiting the execution of juvenile offenders were developed in recognition of the fact that the death

penalty -- with its uniquely cruel and irreversible character -- is a particularly inappropriate penalty for individuals who have not attained full physical or emotional maturity at the time of their actions. Children and adolescents are widely recognized as being less responsible for their actions than adults, and more susceptible to rehabilitation, thus rendering the death penalty a particularly inhumane punishment in their cases. Criminologists have also noted that arguments used to support the death penalty are especially inapplicable in the case of young people. It is recognized that children and adolescents are more liable than adults to act on impulse, or under the influence or domination of others, with little thought for the long-term consequences of their

actions, and they are particularly unlikely to be deterred by the death penalty. Many young people who commit brutal crimes themselves come from brutalized and deprived backgrounds. To impose the death penalty in such cases, whether as retribution or as an intended deterrent, violates basic principles of humanity.

The Eighth Amendment of the Constitution of the United States offers a strong guarantee of basic human rights to the people of the United States in part because it cannot be interpreted in isolation from the human rights norms of the international community. The Eighth Amendment, like the laws, practices and treaties of the rest of the world, should be understood as prohibiting the killing of anyone as punishment for crimes committed as a child and thus should be

found to prohibit the execution of Heath A. Wilkins and Jose Martinez High. By so holding, this Court will reaffirm the essential role of the United States Constitution as the basic charter of a nation committed to respect for human rights.

The ruling in this case will matter not simply to these two young men, or to the handful of other juvenile offenders already sentenced to die in the United States, or even just to the people of the United States. In truth, the attention of the world at large will be justifiably concerned about United States' adherence to this widely accepted international standard. Though this Court's role is to expound a constitution applicable to persons within the United States, this Court has long recognized that "evolving standards of decency" in the world cannot

and should not be excluded from its constitutional analysis under the Eighth Amendment. "Evolving standards of decency" in the United States and throughout the world require that these death sentences be set aside.

DATED: September 3, 1988

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## APPENDIX



APPENDIX

ABOLITIONIST AND RETENTIONIST  
COUNTRIES (AS OF APRIL 1987)

August 1988

ABOLITIONIST BY LAW FOR ALL CRIMES

(Countries whose laws do not provide for  
the death penalty for any crime)

	<u>ICCPR*</u>	<u>AMER CONV</u>
Australia	x	
Austria	x	
Cape Verde		
Colombia	x	x
Costa Rica	x	x
Denmark	x	
Dominican Republic	x	x
Ecuador	x	x
Finland	x	
Federal Republic of Germany	x	
France	x	
German Democratic Republic		
Haiti		x

\*Countries which have ratified or  
acceded to the International Covenant on  
Civil and Political Rights or the  
American Convention on Human Rights are  
noted by an "x" and countries which have  
signed, but not ratified, these treaties  
are noted by an "s."

	<u>ICCPR</u>	<u>AMER CONV</u>
Holy See		
Honduras	s	x
Iceland	x	
Kiribati		
Lichtenstein		
Luxembourg	x	
Marshall Islands		
Microneasia		
Monaco		
Netherlands	x	
Nicaragua	x	x
Norway	x	
Panama	x	x
Philippines	x	
Portugal	x	
Solomon Islands		
Sweden	x	
Tuvalu		
Uruguay	x	x
Vanuatu		
Venezuela	x	x
Total: 34 countries		

ABOLITIONIST BY LAW FOR ORDINARY CRIMES ONLY.

(Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime)

Argentina	x	x
Bhutan		
Brazil		
Canada	x	
Cyprus	x	
El Salvador	x	x

	<u>ICCPR</u>	<u>AMER CONV</u>
Fiji		
Israel	s	
Italy	x	
Malta		
Mexico	x	x
New Zealand	x	
Papua New Guinea		
Peru	x	x
San Marino	x	
Sao Tome and Principe		
Seychelles		
Spain	x	
Switzerland		
United Kingdom	x	
Total: 20 countries		

RETENTIONIST

(Countries and territories whose laws provide for the death penalty for ordinary crimes. However, some of these countries have not in practice carried out executions in recent years.)

\*Countries marked with an \* have not executed anyone for at least the last 10 years (and in some cases for decades) and may be considered abolitionist de facto. 27 countries and territories fall within this category.

\*\*This column indicates countries which have prohibitions against the execution of juvenile offenders in their national legislation based on the most current information available to AI. This survey is not necessarily complete and other countries may also have such legislation.

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV** PROHB</u>
Afghanistan	x		x
Albania			x
Algeria	s		x
Andorra*			
Angola			x
Anguilla*			x
Antigua and Barbuda			x
Bahamas			x
Bahrain*			x
Bangladesh			
Barbados	x	x	
Belgium*	x		
Belize			x
Benin			
Bermuda			
Bolivia*	x	x	
Botswana			x
British Virgin Islands*			
Brunei			
Darussalam*			x
Bulgaria	x		x
Burkina Faso			
Burma			
Burundi			x
Cameroon	x		x
Cayman Islands*			x
Central African Republic	x		
Chad			
Chile	x	s	
China (People's Republic)			
Comoros*			
Congo	x		
Cuba			x
Czechoslovakia	x		x

A-4

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV** PROHB</u>
Djibouti*			
Dominica			x
Egypt	x		x
Equatorial Guinea	x		
Ethiopia			x
Gabon	x		
Gambia*	x		
Ghana			
Greece*			x
Grenada		x	x
Guatemala		x	
Guinea	x		x
Guinea-Bissau			x
Guyana	x		
Hong Kong*			
Hungary	x		x
India	x		
Indonesia			
Iran	x		
Iraq	x		
Ireland*	s		
Ivory Coast*			
Jamaica	x	x	x
Japan	x		x
Jordan	x		x
Kampuchea	x		
Kenya	x		x
Korea (Dem. People's Rep.)			
[No. Korea]	x		
Korea (Rep.)			
[So. Korea]			
Kuwait			x
Laos			
Lebanon	x		
Lesotho			x
Liberia	s		x

A-5



	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV** PROHB</u>
Libya	x		x
Madagascar*	x		x
Malawi			x
Malaysia			
Maldives*			
Mali*	x		x
Mauritania			
Mauritius	x		
Mongolia	x		x
Montserrat*			x
Morocco	x		
Mozambique			
Namibia			
Nauru*			
Nepal			
Niger*	x		x
Nigeria			
Oman			x
Pakistan			
Paraguay*		s	x
Poland	x		x
Qatar*			
Romania	x		x
Rwanda	x		
Saint Christopher and Nevis			x
Saint Lucia			x
Saint Vincent and the Grenadines	x		x
Samoa*			x
Saudi Arabia			x
Senegal*	x		
Sierra Leone			x
Singapore			
Somalia			
South Africa			
Sri Lanka*	x		
Sudan	x		

A-6

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV** PROHB</u>
Suriname	x	x	
Swaziland			x
Syria	x		x
Taiwan (Republic of China)			x
Tanzania	x		x
Thailand			x
Togo	x		
Tonga			
Trinidad and Tobago	x		x
Tunisia	x		x
Turkey			x
Turks and Caicos Islands*			x
Uganda			
Union of Soviet Socialist Republics	x		x
United Arab Emirates			x
United States			
Viet Nam	x		x
Yemen (Arab Republic) [North Yemen]			
Yemen (People's Democratic Republic) [South Yemen]	x		x
Yugoslavia	x		x
Zaire	x		x
Zambia	x		x
Zimbabwe			
Total: 126 countries and territories			

A-7

COUNTRIES WHICH HAVE ABOLISHED THE DEATH  
PENALTY SINCE 1975

(In recent years, at least one country a year has abolished the death penalty in law or, having done so for ordinary offenses, has gone on to abolish it for all offenses.)

1975: Mexico abolished the death penalty for ordinary offenses.

1976: Canada abolished the death penalty for ordinary offenses.

1976: Portugal abolished the death penalty for all offenses.

1978: Spain abolished the death penalty for ordinary offenses.

Denmark abolished the death penalty for all offenses.

1979: Luxembourg, Nicaragua and Norway abolished the death penalty for all offenses.

Brazil<sup>1</sup> and Fiji abolished the death penalty for ordinary offenses.

1980: Peru abolished the death penalty for ordinary offenses.

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<sup>1</sup> Brazil had abolished the death penalty in 1882 but reintroduced it in 1969 while under military rule.

1981: France abolished the death penalty for all offenses.

1982: The Netherlands abolished the death penalty for all offenses.

1983: Cyprus and El Salvador abolished the death penalty for ordinary offenses.

1984: Argentina<sup>2</sup> and Australia abolished the death penalty for ordinary offenses.

1985: Australia abolished the death penalty for all offenses.

1987: Haiti, the German Democratic Republic, Lichtenstein and the Philippines abolished the death penalty for all offenses.

Moves to reintroduce the death penalty have been defeated in a number of countries in recent years.

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<sup>2</sup> Argentina had abolished the death penalty for all offenses in 1921 and again in 1972 but reintroduced it in 1976 following a military coup.

(1)  
NOS. 87-6026 & 87-5666

87-5765 (2)

**FILED**

OCT 13 1988

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HEATH A. WILKINS, Petitioner  
- versus -  
STATE OF MISSOURI, Respondent

JOSE MARTINEZ HIGH, Petitioner  
- versus -  
WALTER ZANT, WARDEN, Respondent

On Writs Of Certiorari To The Supreme Court Of  
Missouri And United States Court Of Appeals  
For The Eleventh Circuit

BRIEF OF AMICI CURIAE FOR RESPONDENTS MISSOURI AND  
GEORGIA BY KENTUCKY AND ALABAMA, ARIZONA, ARKANSAS,  
CONNECTICUT, FLORIDA, INDIANA, MISSISSIPPI, MONTANA,  
NEVADA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA,  
SOUTH DAKOTA, VIRGINIA, AND WYOMING

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INTERESTS OF AMICI CURIAE  
IN SUPPORT OF RESPONDENTS,  
THE STATES OF GEORGIA AND MISSOURI

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The amici curiae represented here are States having an interest in whether or not the Eighth and Fourteenth Amendments automatically exempt 16 and 17 year old murderers from capital punishment by reason of those killers' age.

Amici submit this brief in support of respondents, the States of Georgia and Missouri, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

The courts below correctly held that the Eighth Amendment does not endow teenaged murderers with an automatic exemption from capital punishment. Wilkins v. State, Mo., 736 S.W.2d 409 (1987); High v. Kemp, 819 F.2d 988 (11th Cir. 1987). To rule otherwise would substantially depart from the longstanding premise of this Court that capital cases must be given individualized consideration. It would also interfere with the

prerogative of State legislatures whose function is to determine public policy concerning crimes and punishments.

All the States consider the special mitigation of youth in assessing criminal responsibility, but recognize there are many exceptions to the general rule. This commonsense approach is reflected by legislative recognition of an age range in which the presumption of immaturity may be rebutted in a particular case. State legislatures set the maximum age for juvenile court jurisdiction as high as they do to benefit every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By reaching safely beyond the common denominator of chronological immaturity, the States are justified in examining each such offender individually to determine whether an exception should be made in his or her particular case. Doing so tends to avoid the obvious unfairness of exposing virtually indistinguishable killers to vastly different potential punishments.



There is no societal consensus against the execution of 16 and 17 year old murderers. Of the 36 States having the death penalty, 25 authorize that punishment for 16 and 17 year old capital offenders. Even the 14 non-capital States subject killers of this age to their most severe penalties. Thus, 50% of all States expose this age group to capital punishment, 69% of all death penalty States do so, and 78% of all States impose their most severe authorized penalty upon such offenders. A non-capital State's failure to authorize the death penalty for persons of any age cannot reasonably be interpreted as a policy conferring leniency upon teenagers.

Neither would it be logical to assume that any State has unwittingly exposed its juveniles to capital punishment. All the death penalty States have enacted or amended their juvenile jurisdiction transfer statutes after they authorized capital punishment. It is a universal and necessary rule of statutory construction to assume that the legislature is cognizant of its prior enactments.

## ARGUMENT

THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT IMMUNIZE 16 and 17 YEAR OLD MURDERERS FROM CAPITAL PUNISHMENT SIMPLY BY REASON OF THEIR CHRONOLOGICAL AGE.

I.

### THOMPSON V. OKLAHOMA IS NOT DISPOSITIVE OF THESE CASES

The question at issue is whether or not the legal execution of 16 and 17 year old murderers would, by reason of their birthdates, amount to cruel and unusual punishment per se under the Eighth and Fourteenth Amendments.

In urging the Court to draw a "bright line" exempting all killers under the age of 18 years from capital punishment, petitioners and their amici rely primarily upon Thompson v. Oklahoma, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2687 (1988)(plurality decision). They attach significance to the fact that all eight of the Justices who sat on the Thompson Court either found (four), or at least expressly assumed (four), the existence of some age limit for the death penalty. Petitioners now contend that the same considerations which led to the result in Thompson should likewise control the decision here.

For various reasons, however, Thompson is not at all dispositive of these cases. First, less than a majority of this Court found that a "national consensus" of any kind exists on the subject of limiting capital punishment according to age. Although the four-Justice plurality in Thompson found the existence of a national consensus on the subject, neither the concurring opinion of Justice O'Connor nor the three-Justice dissent concluded that such agreement on the matter exists among the States.

Thus, less than a majority of this Court actually declared a specific minimum age limit for capital punishment, and in drawing their "bright line" at below age 16 even the plurality expressly left open the question concerning killers above that age:

[Thompson's] counsel and various amici curiae have asked us to "draw a line" that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.

Thompson at 2700 (plurality opinion).



Next, as explained at greater length in Argument V of this brief, those who in Thompson were able to divine a national consensus against the capital punishment of 15 year old murderers will find substantially less evidence to support that conclusion where 16 and 17 year olds are concerned. A significantly larger number of States authorize such legal executions, hence the relatively greater number of 16 and 17 year old killers being sentenced to death by judges and juries throughout the country.

The presumption of a 16 or 17 year old's immaturity is more easily rebutted than that of a younger person who, unlike the petitioners in these cases, is neither emancipated nor stands at the threshold of adulthood.<sup>1/</sup> The greater ease

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1/. Jose High was still living at home (Habeas Corpus 52, 54) but had been traveling across the country to New Jersey and Philadelphia with two fellow criminals whom he considered his subservient "family." (Trial 564, 775, 790). Filed after the granting of certiorari in his case, Georgia's suggestion of mootness raises a serious question as to whether High was even a juvenile when he executed 11 year old Bonnie Bulloch.

with which this presumption may be reliably rebutted arises from common human experience and observation that is reflected by State juvenile transfer statutes. States universally recognize, as well they should, that some individuals of this age deserve to be treated as adults<sup>2/</sup> while others do not. This is why State legislatures take the precaution of drawing the line for juvenile court jurisdiction at an age high enough to include every offender who might reasonably deserve a presumption of immaturity. Then, having obviously reached beyond the common denominator with such arbitrary line-drawing, States are justified in identifying the true adults among that group and punishing them as such on a case-by-case basis.

Petitioners also seek support from Justice O'Connor's concurring opinion in Thompson, attempting to characterize it as a view that any capital sentencing statute is invalid for want of

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2/. So does this Court. See, e.g., Fare v. Michael C., 442 U.S. 707, 734, n.4 (1979)(Justice Powell dissenting); Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

specificity unless the particular provision itself sets an age limit.<sup>3/</sup> They would interpret Justice O'Connor's opinion as a constitutionally required format for arranging the provisions of each State penal code.

Respondents' amici do not view the Thompson concurrence quite so simplistically. The concern expressed by Justice O'Connor was not how a State manifests its intention to capitally punish 15 year old murderers. Rather, her concern was whether the State had actually intended to do so:

Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old

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<sup>3/</sup>. Carried to its logical conclusion, the petitioners' interpretation of the Thompson concurrence would uphold the specified execution of a 16 year old while at the same time invalidating the unspecified execution of a 17 year old killer.



defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.

Thompson at 2710-2711 (concurring opinion), (emphasis added).

Absent "the earmarks of careful consideration", Justice O'Connor chose to err on the side of caution in "this unique situation." Id. at 2711. Such reasoning presumably would not apply where a State in one way or another has demonstrated that it considered a minimum age for capital punishment. As detailed in Argument III of this brief, neither should such a result obtain where it may safely be assumed that the legislature was cognizant of the death penalty statute's reach.

## II.

**PUNISHMENT IS A QUESTION OF LEGISLATIVE POLICY AND ANY EIGHTH AMENDMENT ANALYSIS MUST GIVE APPROPRIATE DEFERENCE TO THE LEGISLATURE.**

The plurality, concurring, and dissenting opinions in Thompson all agree that views of society and contemporary moral standards are reflected by the enactments of legislative

bodies.

It will rarely if ever be the case that the members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

Thompson at 2715 (Justice Scalia dissenting).

Twenty-five States<sup>4/</sup> authorize the execution of 16 and 17 year old murderers. In order to accept petitioners' argument that evolving standards of decency proscribe execution of any person under 18, the standards of decency as evidenced by the legislative enactments of half of these United States must flatly be rejected.

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4/. Ala.Code §12-15-34(a); Ariz.Rev.Stat. Ann. §8-202 and Ariz.Rules of Proc. for Juvenile Court 12 & 14; Ark.Code Ann. §§5-1-116(b) & 5-10-101; 10 Del.Code Ann. §938(a)(1) and 11 Del.Code Ann. §§636 & 4209; Fla.St. Ann. §39.02(5)(c)(1); Ga.Code Ann. §17-9-3; Idaho Code §16-1806(1)(a); Ind.Code Ann. §35-50-2-3(b); Ky.Rev.Stat. §640.040(1); La.Rev.Stat. Ann. §§14:30 & 13:1570(A)(5); Miss.Code Ann. §43-21-151 (3); Mo.Rev.Stat. §211.071.1; Mont.Code Ann. §41-5-206(1)(a)(i) & §45-5-102; Nev.Rev.Stat. §176.025; N.H.Rev.Stat. Ann. §§21-B:1, 630.1(v) and 630.5(X111); N.C.Gen.Stat. §74-608 & 13-17; 10 Okla.Stat. Ann. §1104.2 & 1112(b); 42 Pa.Cons.Stat. Ann. §§6322(a)(1978), 6355(a)(2); S.C.Code Ann. §20-7-430(6); S.D. Codified Laws Ann. §§26-8-7 & 26-11-4; Tex.Penal Code Ann. §8.07(d); Utah Code Ann. 78-3a-25(1); Va. Code Ann. §16.1-269(A); Wash.Rev.Code §9A.32.030(2), 10:95.020 & 13.40.110(1)(a); Wyo.Stat. §14-6-237.

The deference we owe to the decisions of the state legislature under our federal system [citation omitted] is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." [citations omitted].

Gregg v. Georgia, 428 U.S. 153, 177 (1976).

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 176.

If petitioners' bright-line standard is adopted, this "heavy burden" is ignored.

### III.

**IT IS UNIVERSALLY AND NECESSARILY PRESUMED THAT LEGISLATURES ARE AWARE OF THEIR OTHER ENACTMENTS, AND OF THE PRIOR INTERPRETATIONS GIVEN TO SUCH STATUTES, WHEN ENACTING A SUBSEQUENT STATUTE.**

Contrary to the assertions of the petitioners, these cases do not turn on the organizational structure of the States' capital



sentencing schemes. While their chief contention is that juveniles are invariably too immature for capital punishment despite any and all countervailing indicia, they alternatively posit the one-Justice Thompson concurrence as prescribing the only constitutional means by which a juvenile death penalty statute may be enacted. According to the petitioners and their amici, juveniles cannot be subjected to the death penalty unless the capital sentencing statute itself specifies a minimum age. Otherwise, they claim, by setting the minimum age in a separate juvenile waiver statute without mentioning it again in the capital sentencing provision, the legislature might not realize that such youthful killers would be subject to the death penalty.

The fallacy of such reasoning is self-evident. Some State legislatures, for example, have arranged their penal codes so that crimes are defined in one chapter while the various penalties and defenses therefor are provided in another. Presumably, not even the petitioners would seriously allege that such an

organizational format renders the entire penal code invalid for failure of one provision to specifically refer to another.

It is always appropriate to assume that our elected representatives, like other citizens, know the law. . . we are especially justified in presuming both that those representatives were aware of the prior interpretation. . . and that their interpretation reflects their intent. . . .

Cannon v. University of Chicago, 441 U.S. 677, 696-698 (1979). See also, e.g., Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 319 (1983); Shapiro v. United States, 335 U.S. 1, 16 (1947); Lewis v. United States, 445 U.S. 55, 61-64 (1980); Roche Products v. Bolar Pharmaceutical Co., 733 F.2d 858 (D.C. Cir. 1984); Florida Nat. Guard v. Federal Labor Rel. Authority, 699 F.2d 1082 (11th Cir. 1983); Martin v. Luther, 689 F.2d 109 (7th Cir. 1982); United States v. Professional Air Traffic Controllers, 653 F.2d 1134 (7th Cir. 1981); Air Transport, Etc. v. Profess. Air Traffic, Etc., 667 F.2d 316 (2nd Cir. 1981); Anderson Seafoods, Inc. v. Graham, 529 F.Supp. 512 (N.D. Fla. 1982); Anderson v. Black & Decker, 597

F.Supp. 1298 (E.D. Ky. 1984); Daou v. Harris, 139 Ariz. 353, 678 P.2d 934 (1984); In re Misener, 213 Cal.Rptr. 569, 38 C.3d 543, 698 P.2d 637 (1985); Ingram v. Cooper, Colo., 698 P.2d 1314 (1985); State v. Dupree, 196 Conn. 655, 495 A.2d 691 (1985); Giuricich v. Emtrol Corp., Del., 449 A.2d 232 (1982); State v. Dunmann, Fla., 427 So.2d 166 (1983); Leonard v. Benjamin, 253 Ga. 718, 324 S.E.2d 185 (1985); Marsland v. Pang, 5 Hawaii App. 463, 701 P.2d 175 (1985); People v. Palmer, 84 Ill.Dec. 658, 104 Ill.2d 340, 472 N.E.2d 795 (1984); Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc., Ky., 690 S.W.2d 393 (1985); Bunch v. Town of St. Francisville, La.App., 446 So.2d 1357 (1984); Mayor and City Council of Baltimore v. Hackley, 300 Md. 277, 477 A.2d 1174 (1984); People v. Smith, Mich., 378 N.W.2d 384 (1985); Kilowatt Organization (TKO), Inc. v. Dept. of Energy, Planning and Development, Minn., 336 N.W.2d 529 (1983); Holt v. Burlington Northern R. Co., Mo.App., 685 S.W.2d 851 (1984); Thiel v. Taurus Drilling Ltd., Mont., 710 P.2d 33 (1985); Douglas County v. State, 210 Neb. 762, 316 N.W.2d



767 (1982); Boulder City v. General Sales Drivers, etc., 101 Nev. 117, 694 P.2d 498 (1985); Mahwah Tp. v. Bergen County Bd. of Taxation, 98 N.J. 268, 486 A.2d 818 (1985); Garrison v. Safeway Stores, 102 N.M. 179, 692 P.2d 1328 (1984); Arbegast v. Board of Ed. of South New Berlin Cent. School, 490 N.Y.S.2d 751, 65 N.Y.2d 161, 480 N.E.2d 365 (1985); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Clark, N.D., 367 N.W.2d 168 (1985); Commonwealth v. Milano, 300 Pa. Super. 251, 446 A.2d 325 (1982); State v. Feiok, S.D., 364 N.W.2d 536 (1985); Brown-Forman Distillers Corp. v. Olsen, Tenn.App., 676 S.W.2d 567 (1984); Driscoll v. Harris County Com'rs. Court, Tex.App., 688 S.W.2d 569 (1985); Murray City v. Hall, Utah, 663 P.2d 1314 (1983); State v. Peterson, 100 Wash.2d 788, 674 P.2d 1251 (1984); Pullano v. City of Bluefield, W.Va., 342 S.E.2d 164 (1986); In Interest of P., 119 Wisc.2d 349, 349 N.W.2d 743 (1984); Capwell v. State, Wyo., 686 P.2d 1148 (1984).

Carried to its logical conclusion, the petitioners' interpretation of the Thompson

concurrence would exempt juvenile murderers from non-capital punishments as well as from the death penalty. According to their analysis, a teenaged killer could not even be sentenced to life in prison unless the homicide statute itself specified a minimum age limit. Such an approach is neither reasonable nor required by the Eighth Amendment.

It would be unrealistic to conclude from statutory format alone that a State has failed to appreciate or seriously consider the scope of its death penalty law. Indeed, all 36 of the death penalty States<sup>5/</sup> have either passed or amended in some manner their juvenile waiver statutes after they authorized capital punishment: Ala.Code §12-15-34(a)(Repl.1982); Ariz.Rev.Stat.Ann. §8-202 (1974), Ariz. R.P. Juv.Ct. 12, 14; Ark. Code Ann.

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5/. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming.

§§885-1-116(b), 5-10-101 (1987); Cal.Pen.Code §190.5  
(1988); Col.Rev.Stat. §16-11-103 (1)(a)(Repl.1986);  
Conn. Gen.Stat. Ann. §53a-46a(g)(1) (1987); 10  
Del.Code Ann. §938(a)(1)(1975), 11 Del.Code Ann.  
§§636, 4209 (Repl. 1987); Ga. Code Ann. §17-9-3  
(1982); Fla.Stat. Ann. §39.02(5)(c)(1)(Supp. 1988);  
Idaho Code §816-1806 (1)(a)(Supp. 1988); 38  
Ill. Ann. Stat. §9-1(b)(Supp. 1988); Ind. Code Ann. §  
35-50-2-3(b)(Supp. 1988); Ky.Rev.Stat.  
§640.040(1)(Supp. 1987); La. Rev.Stat. Ann. §§614.30,  
13:1570(A)(5)(1986); 27 Md. Code §412(f)(Repl.  
1988); Miss. Code Ann. §43-21-151(3)(Supp. 1987);  
Mo.Rev. Stat. §211.071.1 (1986); Mont. Code Ann.  
§§41-5.206(1)(a)(i), 45-5-102 (1987); Nebr. Rev.  
Stat. §28-105.01 (1985); Nev. Rev. Stat. §176.025  
(1987); N.H. Rev. Stat. Ann. §§21-B:1, 630.1 (V),  
630.5 (XIII)(1986, Supp. 1987); N.J. Stat. Ann.  
§§2A:4A-22(a), 2C:11-3(g)(Repl. 1987, Supp. 1988);  
N.M. Stat. Ann. §§28-6-1(A), 31-18-14(A)(Repl.  
1987); N.C. Gen.Stat. §§74-608, 14-17 (Supp. 1987);  
Ohio Rev. Code Ann. §2929.02(A)(1986); 10 Okla.  
Stat. Ann. §§1104.2, 1112(b)(1987); Ore. Rev. Stat.  
§§161.620, 419.476(1)(1987); 42 Pa. Cons.Stat. Ann.



§6322(a)(1978) & §6355(a)(1)(1982); S.C. Code Ann. §20-7-430(6)(1985); S.D. Cod.L. Ann. §§26-8-7, 26-11-4 (1984); Tenn. Code Ann. §§37-1-102(3), 37-1-134(a)(1); Tex. Pen. Code Ann. §8.07(d)(Supp. 1988); Utah Code Ann. §78-3A-25(1)(1987); Va. Code Ann. §16.1-269(A)(Repl. 1988); Wash. Rev. Code §§9A.32.030(2), 10.95.020, 13.40.110(1)(a)(1988, Supp. 1988); Wyo. Stat. §14-6-237 (1986).

It is a necessary rule of statutory construction to assume that one legislative hand knows what the other has done, and this is an especially safe assumption given the relative timing of the enactments and revisions at issue here. In view of all the foregoing, it would be less than credible to assert that any State has unwittingly exposed youthful murderers to capital punishment.

#### IV.

**THE LAWS OF NON-DEATH PENALTY STATES SHOULD BE COUNTED AS SUPPORTIVE OF RESPONDENTS, RATHER THAN PETITIONERS, IN DECIDING WHETHER A NATIONAL CONSENSUS EXISTS ON THE PUNISHMENT OF JUVENILE MURDERERS.**

Fourteen States adopt a minority position that capital punishment should never be inflicted

upon persons of any age. Consequently, the Thompson plurality did not consider any of the laws of these 14 States as holding 15, 16, and 17 year olds culpable and accountable for the crime of murder. Respondents' amici believe such examination is necessary. It refutes the theory there is a societal consensus that 15, 16 and 17 year olds are categorically less accountable for their acts and should therefore be excluded from imposition of a State's most severe punishment for its most severe violent crime - murder.

The 14 non-capital States either have no juvenile court jurisdiction over 16 and 17 year olds or can waive them to be tried as adults for the crime of murder. All 14 allow imposition of the maximum penalty for murder against persons of those ages.

1). Alaska has no age limitation restricting waiver and transfer of individuals less than 18 years to criminal court. Alaska Stat. §410.060. Any person waived to stand trial as an adult is subject to the maximum punishment of imprisonment for 99 years. Alaska Stat. §12:55:125.

2). Hawaii permits transfer of a person 16 or 17 years old to criminal court upon waiver of jurisdiction by the family court after a hearing. HRS §571-22. The maximum punishment carries a penalty of life imprisonment without possibility of parole subject to commutation after twenty years to life imprisonment with parole. HRS §706-656.

3. Iowa allows waiver of any individual between 14 and 18 years old. A person waived from juvenile court is subject to the maximum penalty of life in prison. 37 ICA §902.1.

4). Kansas permits 16 and 17 year olds to be waived to adult criminal court. Certain categories of 16 year olds are exempt from juvenile court jurisdiction and subject to prosecution as an adult. Kan.Stat.Ann. §§21-3611, 38-1602(b)(3)(4)(6); 38-1604(a). There is no restriction for imposing the maximum penalty of life in prison on this class of individuals. Kan.Stat.Ann. 45-21-4501(a).

5). Maine has no age limitation in its waiver statute. Chapter 503, Title 15-3101. A



sentence of life in prison is the maximum penalty which may be imposed. Chapter 51, Title 17A-1152.

6). Massachusetts juvenile courts have no jurisdiction over 17 year olds. Mass.Gen.Laws Ann. 119 §21. Fourteen, 15 and 16 year olds may be waived to adult criminal courts. Id. The maximum penalty which may be imposed is life imprisonment. Id. 265 §2.

7). Michigan treats 17 year olds as adults with juvenile courts having concurrent jurisdiction of offenders between 17 and 18 years of age and charged with certain enumerated offenses or conduct. Mich.Laws Ann. §712A.2(d). Waiver is allowed for individuals age 15 and 16 charged with committing felonies. Id. 712A.4(1). The maximum penalty is life imprisonment. Id. 750.316.

8). Minnesota permits waiver of individuals aged 14, 15, 16 and 17. Waiver is mandatory in certain cases and a prima facie case of nonamenability to treatment within the juvenile court system is considered established if the individual is charged with certain enumerated

offenses. Minn.Stat.Ann. §260.125(1)(3)(3a). The maximum period of incarceration is life. §609.10.

9). New York juvenile courts have no jurisdiction over any individual older than 16. Juvenile court jurisdiction is also excluded for individuals aged 13 or older charged with second degree murder and individuals 14 and older charged with second degree murder or other enumerated violent crimes. N.Y.Fam.Ct.Act §301.2(1)(b) (McKinney 1983); N.Y. Penal Law §§10(18), 30(2) (McKinney Supp. 1987); N.Y.Crim.Pro.Law §§180.75, 190.71, 210.43, 220.10(5)(g) (McKinney 1982 and Supp. 1987). The maximum penalty for a juvenile offender (under 16) is life with an indeterminate sentence of a minimum of not less than 5 years but not to exceed 9 years and a maximum of at least 3 years. CLS, Penal Law §70.05.

10). North Dakota allows persons 14, 15, 16 and 17 to stand trial as adults after a waiver hearing. In the case of 14 and 15 year olds the charged offense must involve infliction or threat of serious bodily harm. Sixteen and 17 year olds may request waiver and transfer. N.D. Cont.Code

§27-20-34(1). The maximum punishment is life without eligibility for parole for 30 years, less sentence reduction for good conduct. N.D. Cont. Code §2.1-32.01.

11). Rhode Island permits waiver of 16 and 17 year olds charged with indictable offenses. R.I. Gen.Laws Ann. §14-1-7. The maximum penalty for murder is life without eligibility for parole. R.I. Gen. Laws Ann. §§11-23-2, 12-19.2-1.

12). West Virginia permits waiver from juvenile court of any person charged with murder regardless of age. W.Va. Code Ann. §49-5-10(c)(d). The maximum sentence is life without parole unless the jury recommends mercy. W.V. Code Ann. §62-3-15.

13). Wisconsin allows persons 16 and 17 to be waived from juvenile court jurisdiction to stand trial as adults. The maximum penalty for first degree murder is life in prison. Wisc. Code §§939.50(3)(a), 940.01.

14). Vermont has no juvenile court jurisdiction of delinquents over 16. Vt.Stat.Ann. Title 33 §632(a)(1). Waiver is allowed for



individuals 10 years of age but less than 14 for murder and other enumerated crimes. Id. Title 33, §635A(a). Juvenile courts have no jurisdiction over persons 14 and 15 charged with murder or certain other crimes unless the case is transferred from criminal court to juvenile court. The maximum penalty for murder in the first degree is life imprisonment for a minimum term of 35 years; with a finding of mitigation, for a minimum of not less than 15 years; up to and including life without parole. T.123 §2303(a).

The plurality and concurring opinions in Thompson assume that the 14 States which do not impose capital punishment contribute to a societal consensus that the death penalty is inappropriate for 15 year olds. These States proscribe the death penalty for all persons regardless of age. These States reflect a minority view. Even though these States prohibit capital punishment, all 14 recognize that some young offenders should be treated as adults in terms of culpability and accountability for crimes they commit. Once the determination is made that teenaged offenders

should be tried as adults and held responsible for their violent acts, no limitation is placed on the maximum penalty which may be imposed. They are to be treated as any other adult criminal. The juvenile justice system no longer affords them protection from punishment merely because of age. The societal consensus of all 14 non-capital States is that 16 and 17 year olds<sup>6/</sup>, by reason of age alone or the serious nature of the offense or other considerations determined by waiver hearings, should be subject to the most severe punishment authorized by their statutes. There is no consensus among these 14 States that 16 and 17 year olds should not suffer maximum penalties. The consensus shows the contrary.

V.

**NO SOCIETAL CONSENSUS EXISTS THAT 16  
AND 17 YEAR OLDS SHOULD BE EXEMPTED  
FROM TO THE DEATH PENALTY.**

Among the 36 States which endorse capital punishment, there is no consensus of a minimum age

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<sup>6/</sup>. Since execution of persons committing capital crimes when age 16 or 17 is before the Court, ages younger than 16 are not discussed.

at which defendants may be sentenced to death. Seven States, Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina and Wyoming, have no age limitation. South Dakota specifies a minimum age of 10 years. Montana specifies age 12; Mississippi age 13; Alabama, Idaho, Missouri, North Carolina, and Utah age 14. Arkansas, Louisiana and Virginia have a minimum age limitation of 15. Indiana, Kentucky, Nevada and Washington limit execution to individuals age 16 or older. Georgia, New Hampshire and Texas specify a minimum age limitation of 17. California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Oregon and Tennessee draw the line at 18 years of age. (See footnote 4.)

There is no broad agreement among the States at what age capital punishment can be imposed. Since no societal consensus can be discerned from legislative enactments, no bright-line should be drawn prohibiting the death penalty for any person under 18 years of age.

Analysis of jury deliberations and verdicts affords no evidence of consensus as to the



appropriateness of executing 16 and 17 year old murderers. Petitioners and their amici assume that since few 16 and 17 year olds have received the death penalty or been executed, it must mean there is a general abhorrence throughout society of inflicting the death penalty on persons of those ages. Petitioners' proposition fails to account for the realities of the juvenile justice system.

The Office of Juvenile Justice and Delinquency Prevention recently commissioned a research, test and demonstration study (The Juvenile Serious Habitual Offender/Drug Involved Program) which focused on serious, chronic, violent juvenile offenders.

The SHO/DI program found that most juvenile delinquents:

" . . . do not even make it into court. Rather, they are diverted out of the juvenile justice system, early in the process, often before they ever get to court. According to Paul Strasburg:<sup>7/</sup> Between 80 and 90 percent of arrested children are diverted or dropped from the judicial

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<sup>7/</sup>. Strasburg is the author of Violent Delinquents, A Report to The Ford Foundation.

process with little or no supervision. Half are diverted by the police themselves. And up to two-thirds of the cases left may be withdrawn, dismissed, or adjourned in contemplation of dismissal."<sup>8/</sup>

Data analysis obtained during the program revealed that the "serious juvenile population is very, very small. Overall, they represent less than one percent of the entire juvenile population."<sup>9/</sup>

The fallacy of Petitioners' reliance on jury verdicts and the conclusions drawn therefrom become apparent when other factors such as the following are considered:

- 1). The relatively small number of violent juvenile offenders.

- 2). The disproportionate number of juveniles diverted or never brought into the juvenile justice system, much less the criminal system.

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8/. Juvenile & Family Court Journal, 1986, Vol. 37, No. 5, p.28. "Chronic Serious Juvenile Offenders", Wolfgang Pindur, Ph.D., and Donna K. Wells. (Pindur is the National Field Manager of the SHO/DI Program; Wells is also associated with the program.)

9/. Id. at 28.

3). The safeguard of waiver hearings by juvenile courts before transfer of offenders to criminal court.

4). The fact that several States have no death penalty at all.

5). The consideration by juries of the mitigating factor of the defendant's youth.

The fact there are few jury verdicts sentencing 16 and 17 year olds to death does not indicate a consensus against such penalties. All indicators suggest instead that there are few opportunities to even consider them.

The violence of chronic youthful offenders is recognized as the major problem confronting the juvenile justice system.<sup>10/</sup> The National Council of Family Court Judges attempted to address this problem by endorsing 38 recommendations. Among the

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10/. Juvenile & Family Court Journal, 1985, Vol.36, No.2, pp. 27-28, "The Juvenile & Serious Habitual Offender/Drug Involved Program: A Means To Implement Recommendations Of The National Council Of Juvenile & Family Court Judges" by Wolfgang Pindur, Ph.D., and Donna K. Wells commenting on the March 1984 report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC).



various recommendations, two are particularly relevant to the issue presented to this Court.

"Recommendation #1: Serious Juvenile Offenders Should Be Held Accountable By The Courts. The primary focus of the juvenile court for the disposition of serious chronic or violent juvenile offenders should be accountability. Dispositions of such offenders should be proportionate to the injury done and the culpability of the juvenile and to the prior record of adjudication if any.

'In conjunction with this recommendation, the Council acknowledges that "the principal purpose of the juvenile justice court system is to protect the public.'" 11/

"Recommendation #13: Offenders Unamenable To Juvenile Treatment Should Be Transferred. The judges note that "there are juveniles for whom the resources and processes available to the juvenile court will serve neither to rehabilitate the juvenile nor to protect the public."

Juvenile court judges face the problem of violent youths every day. These recommendations acknowledge actual experience and observation that persons of any age engaging in violence should and must be held accountable for their actions. By

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11/. Id. at 31.

their acts, some youths have placed themselves beyond the pale of treatment recognized as appropriate for other individuals of their age group. The remedy left to society at this point is to treat these anomalies of the juvenile justice system as it would any other violent offender. The individual violent youth's culpability and society's expectations of accountability demand nothing less.

The Council's recommendations do not include a call for abolition of the death penalty for youths. This non-recommendation becomes conspicuous by its absence. It must be assumed that juvenile court judges are aware that once a juvenile is transferred to stand trial on murder charges as an adult, the State may impose its maximum penalty. In 25 States, this includes the possibility of death for persons less than 18 years of age. The Council's silence on this question lends support to amici's position that no national consensus exists condemning the death penalty for persons under 18 years old.

VI.

THE INTERNATIONAL TREATIES RELIED UPON BY  
THE PETITIONERS AND THEIR AMICI HAVE NO  
APPLICATION WHATSOEVER IN THESE CASES.

The petitioner and several of their amici<sup>12</sup> claim that international treaties, three in particular, require this Court to exempt 16 and 17 year old murderers from capital punishment aside from Eighth Amendment grounds.

Such contentions are not fairly included in the question for which certiorari was granted, i.e., whether the Eighth and Fourteenth Amendments to the United States Constitution forbid capital punishment of such killers. See United States Supreme Court Rule 21.1(a); See also Buchanan v. Kentucky, 483 U.S. \_\_\_, 107 S.Ct. 2906, 2908, n. 1 (1987), refusing to consider claims extraneous to the questions for which certiorari had been granted.

Two of the treaties relied upon by the petitioners' amici are the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. Neither has been

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<sup>12</sup>/. Amnesty International, Defense For Children International, and International Human Rights Law Group.



ratified by the United States. The third treaty they cite is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Although the United States has ratified that pact, it applies only during war and even then does not prevent any country from executing its own citizens. See 6 U.S.T. 3516, 3520, 3522.

#### VII.

THE LAWS AND CUSTOMS OF FOREIGN COUNTRIES ARE IRRELEVANT TO THE QUESTION OF WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROHIBIT CAPITAL PUNISHMENT OF JUVENILE MURDERERS.

The most unreliable consideration asserted by the petitioners and their amici is that which concerns the laws and customs of foreign countries. Although the Thompson plurality relied upon the position taken by Western European and other Anglo-American nations<sup>13/</sup>, closer inspection reveals that 19 of those 22 countries have no death penalty at all for "ordinary crimes" (except

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<sup>13/</sup>. Respondent's list of these countries would consist of Australia, Austria, Belgium, Canada, Denmark, Finland, France, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and West Germany.

wartime offenses or under circumstances not at issue here). See Amicus Curiae Brief For Amnesty International, A1-A7. The other three such nations have not executed a criminal for at least 10 years. Id. If these figures were extrapolated to the United States, one would expect nationwide opposition to the imposition of capital punishment for any "ordinary" homicide. In fact, precisely the opposite is true. Tison v. Arizona, 483 U.S. \_\_\_, 107 S.Ct. 1676 (1987); Gregg v. Georgia, supra.

The unreliability of such cross-national comparisons is attributable to not only the substantial differences in culture and heritage, but to the very nature of crime in other countries. According to available information, the per capita homicide rate in the United States would appear to be from two to 10 times that of virtually all of the nations discussed above.<sup>14/</sup> It cannot reasonably

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<sup>14/</sup>. Landau, "Trends in Violence and Aggression: A Cross Cultural Analysis," 22 *Annales Internationales de Criminologie* (International Annals of Criminology) 119, 130-131 (1984); Wolfgang and Zahn, "Homicide: Behavioral Aspects," 2 *Encyclopedia of Criminal Justice* 848, 850-851 (1983).

be said that this fact is insignificant in forming the attitudes of other countries with regard to capital punishment, or that the same judgment would be made if these nations had a comparable homicide rate. An additional difficulty of this kind arises with particular regard to the present issue of murders by juveniles. It has never been shown that comparable problems exist in other countries, and in fact there is evidence to the contrary.<sup>15/</sup> Since independent and reliable evidence exists which establishes a consensus in the United States allowing the execution of 16 year olds who commit a capital homicide, no need arises to examine the positions taken by other countries on the basis of their own national experiences.

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<sup>15/</sup>. "[I]n contrast to the pattern in the United States, the increase in crime found so prominently among the young people in Europe seems to have been concentrated among young adults between eighteen to twenty-five years of age instead of youths under eighteen." Ferdinand, "Crime Statistics: Historical Trends in Western Society," 1 Encyclopedia of Criminal Justice 392, 399 (1983).



VIII.

THE DELUGE OF ANTI-DEATH PENALTY  
BRIEFS FILED BY PETITIONERS' AMICI IS  
NOT A RELIABLE INDICATOR OF NATIONAL  
CONSENSUS ON THE PARTICULAR ISSUE  
PRESENTED HERE.

In a concerted and well organized effort to persuade this Court, which they are entitled to do, 34 different organizations have filed or joined amici curiae briefs on behalf of the petitioners. These groups<sup>16/</sup> largely oppose capital punishment

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<sup>16/</sup>. West Virginia Council of Churches, The American Baptist Churches, The American Friends Service Committee, The American Jewish Committee, The American Jewish Congress, The Christian Church (Disciples of Christ), The Mennonite Central Committee; The General Conference Mennonite Church; The National Council of Churches, James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church, The Southern Christian Leadership Conference, The Union of American Hebrew Congregations, The United Church of Christ Commission for Racial Justice, The United Methodist Church General Board of Church and Society, The United States Catholic Conference, Amnesty International, Defense For Children International, International Human Rights Law Group, National Legal Aid And Defender Association, National Association of Criminal Defense Lawyers, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, and the American Bar Association.

under any conceivable circumstances.<sup>17/</sup> Several of these organizations are already suggesting that the "bright line" should be drawn beyond the age of 18. E.g., the American Society for Adolescent Psychiatry, the American Orthopsychiatric Association (at 4, 5, n.5), the National Legal Aid And Defender Association, the National Association of Criminal Defense Lawyers (at 28, n.13), the Defense for Children International (at 58-59, n.71), the West Virginia Council of Churches (at 12).

If this Court were making a legislative judgment as to whether those who commit a capital homicide at age 16 should be eligible for the death penalty, the views of "respected professional organizations" might well be relevant, both as arguments on the merits of the proposed legislation and as an expression on the part of the small segment of society which such groups represent. The views of these individual interest groups, however,

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<sup>17/</sup>. A notable exception is the American Bar Association, which five times in its amicus brief disclaims any general opposition to the death penalty. Id. at 2, 3, 5, 8 and 11.

are not reliable "objective factors" in judging whether a national consensus exists against the execution of 16 and 17 year old killers. By definition, positions taken on behalf of a particular organization at most represent the opinion of its members, not society as a whole. Since no need exists for those entities which approve an existing practice to formally state that fact, resolutions of this character inevitably represent the voices in opposition. Consequently, Georgia and Missouri do not attempt to inundate this Court with amici curiae briefs by the countless victims rights groups which more accurately reflect societal consensus.

As this Court has acknowledged, it is not designed or intended to reflect the views of society, as are legislative or other representative bodies. Gregg v. Georgia, supra, 428 U.S. at 175-176. In paying heed to these groups which have gone to the effort of expressing formal opposition on the present issue, there is a considerable risk of mistaking the clamor of organized protest for a settled national consensus.



IX.

THIS COURT SHOULD NO MORE DRAW A "BRIGHT LINE" FOR CAPITAL PUNISHMENT INELIGIBILITY THAN PRESCRIBE A UNIFORM AGE RANGE FOR JUVENILE JURISDICTION, PROHIBIT TRANSFER THEREFROM, OR RIGIDLY DEFINE THE CIRCUMSTANCES UNDER WHICH INDIVIDUAL EXCEPTIONS THERETO COULD BE MADE.

A ruling by this Court that juveniles are invariably too immature for capital punishment would establish precedent for exempting them from lesser penalties on the same ground.

At least for the time being, the petitioners and their amici do not challenge the prerogative of State legislatures to establish various age ranges for juvenile court jurisdiction. Neither do they, as yet, argue that the transfer of individual offenders from juvenile court for trial as adults is constitutionally prohibited. And although Kent v. United States, 383 U.S. 541, 557 (1966) extends minimum Due Process standards to juvenile transfer proceedings, not even the defense bar suggests that the Court should prescribe the criteria for determining whether a particular offender deserves to be treated as an adult.

State legislatures set the maximum age for juvenile jurisdiction as high as they do to benefit

every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By using this approach to reach beyond the common denominator of chronological immaturity, the States are justified in examining each juvenile individually to determine whether an exception should be made in his or her particular case. As the Court has emphasized on prior occasions, maturity and sophistication are factors which vary from individual to individual, so chronological age is only one of the various circumstances that should be taken into account.

Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully "street wise", hardened criminals deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In Re Gault, 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have.

Fare v. Michael C., supra, 442 U.S. at 734, n.4.

All the States recognize the special mitigation of youth in their juvenile transfer proceedings long before they do so, again, in capital sentencing trials. Consequently, there is no more reason for this Court to draw a "bright line" age requirement for capital punishment than there is for it to do so in the context of juvenile jurisdiction waiver proceedings. In both situations that decision is better left to the individual States whose legislative determinations, for the sake of comity, should be accorded deference by the federal judiciary.

X.

THE APPROPRIATENESS OF A DEATH SENTENCE  
SHOULD CONTINUE TO BE DETERMINED ON AN  
INDIVIDUAL BASIS.

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'  
California v. Brown, 479 U.S. 538, \_\_\_ 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)." Thompson at 2698.

Guided, individualized consideration of the offender's character and the circumstances of his



crime is the touchstone of capital sentencing. See Zant v. Stephens, 462 U.S. 862, 879 (1983), collecting cases. Gregg v. Georgia, 428 U.S. 153 (1976) and its progeny are intended to avoid the kind of "rigid", "mechanical" and "wholly arbitrary" determination urged here by the petitioners. Barclay v. Florida, 463 U.S. 939, 950 (1983). No particular circumstance of a capital offender's crime should automatically require the death penalty, Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976), or automatically foreclose it, Tison v. Arizona, supra. Rather, the sentencer must be "free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008 (1983). Youthfulness is only one such factor and it is not necessarily the most important.

Maturity varies from individual to individual. Some individuals never attain it; some do at an age labeled "child." "Some of the older minors become fully 'street wise' hardened

criminals, deserving no greater consideration than that properly afforded all persons suspected of crime." Fare v. Michael C., supra, 442 U.S. at 734, n.4.

The need for individual consideration of the defendant's character and the circumstances of the crime becomes glaringly apparent now that a question of High's true age has been raised. Has High suddenly become more deserving of the death penalty as a 19 year old murderer, or less deserving of death penalty as a 17 year old murderer? Neither the circumstances of the crime nor the defendant's character at the time he committed the crime have changed. There is no reason relating to the crime or the defendant which should preclude the death penalty for High. To draw a bright-line rule prohibiting execution of anyone less than 18 years of age, and thus prohibiting High's execution if Georgia cannot establish his age at 19, undermines the very purpose of individualized sentencing of offenders, which is to fashion a sentence appropriate to the crime.

XI.

SIXTEEN AND 17 YEAR OLD CRIMINALS WHO ARE TRIED AS ADULTS RECEIVE THE BENEFIT OF INDIVIDUALIZED CONSIDERATION TWICE, WHEN TRANSFERRED FROM THE JUVENILE COURT AND AGAIN WHEN THEY ARE TRIED AS ADULTS.

No national policy of automatic exemption for 16 and 17 year olds from the death penalty exists. For those 16 and 17 year olds subject to juvenile court jurisdiction, waiver proceedings provide individual consideration of whether the offender can best be served by the juvenile or criminal justice system. Kent v. United States, supra, 383 U.S. at 557 requires a hearing, assistance of counsel and a statement of reasons for the transfer. These minimum Due Process rights provide additional safeguards that offenders with presumptive juvenile status will not be arbitrarily reclassified as adults.

In all States where 16 or 17 year olds are eligible for the death penalty, their youth must be presented as a mitigating factor to the sentencer. Eddings v. Oklahoma, 455 U.S. 104 (1982).



Twenty-nine States<sup>18/</sup> have adopted the holding of Eddings through legislation designating the defendant's age as a mitigating factor in capital cases.

In every trial where death is a possible penalty, a 16 or 17 year old will be accorded consideration of his youth in the assessment of punishment. Age alone should not exclude a punishment otherwise deemed appropriate considering the defendant's character and criminal act.

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18/. Ala.Code §13A-5-51(7) (Repl.1982); Ariz.Rev. Stat. Ann. §13-703(G(5)(Supp. 1987); Ark.Code Ann. §5-4-605(4)(1987); Cal.Penal Code §190.05(h)(9)(West 1988); Col.Rev.Stat. §16-11-103(5)(a)(Repl.1986); Conn.Gen.Stat. Ann. §53a-46(a)(g)(1)(1987); Fla.Stat. Ann. §921.141(6)(g)(1985); Ind.Code Ann. §35-50-2-9(c)(7)(Cum.Supp.1988); Ky.Rev.Stat. Ann. §532.025(2)(b)(8)(Cum.Supp. 1988); La.Code Crim. Proc., art. 905.5(f)(1984); 27 Md.Code §413(g)(5)(Repl.1988); Miss.Code Ann. §99-19-101(6)(g)(Cum.Supp. 1987); Mo.Rev.Stat. §565.032.3(7)(1986); Mont.Code Ann. §46-18-304(7)(1987); Nebr.Rev.Stat. §29-2523(2)(d)(1985); Nev.Rev. Stat. §200.035.6 (1987); N.H.Rev.Stat. Ann. §630.5(11)(b)(5)(1986); N.J.Stat. Ann. §2C:11-3(c)(5)(c)(Supp. 1988); N.M.Stat. Ann. §31-20A-6(1)(Repl.1987); N.C. Gen.Stat. §16A-2000(f)(7)(Supp. 1987); Ohio Rev.Code Ann. §2929.04(B)(4)(1986); Ore.Rev.Stat. §163.150(1)(b)(B)(Supp. 1988); 42 Pa.Cons.Stat. Ann. §9711(e)(4)(Supp.1987); S.C.Code Ann. §16-3-20(C)(b)(7,9)(Supp.1987); Tenn.Code Ann. §32-2-203(j)(7)(1982); Utah Code Ann. §76-3-207(2)(e)(Supp. 1988); Va.Code Ann. §19.2-264.4(B)(v)(Repl. 1983); Wash.Rev.Code §10.95.070(7)(Cu.Supp. 1988); Wyo.Stat. §6-2-102(j)(vii)(1988).

CONCLUSION

WHEREFORE, the opinions below should be affirmed.

Respectfully submitted,

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